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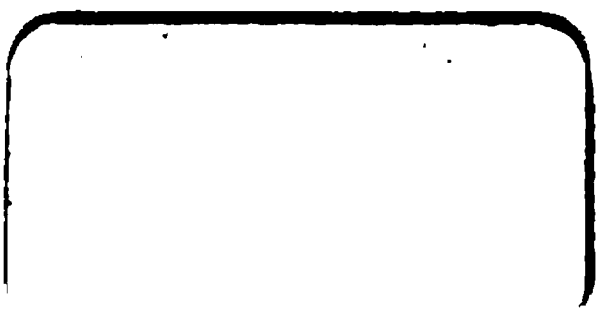
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**REVISED LAWS**

**OF THE**

**STATE OF CALIFORNIA;**

**IN FOUR CODES:**

**POLITICAL, CIVIL, CIVIL PROCEDURE AND PENAL.**

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**CIVIL CODE.**

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**SACRAMENTO:**

**D. W. GELWICKS, STATE PRINTER.**

**1871.**



## PREFACE.

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This, the CIVIL CODE, must, in the main, speak for itself. There is so much urgent labor to be performed by the Commission before the meeting of the Legislature, that a more elaborate exposition must be left to a future occasion. It contains four grand Divisions. These are divided into Parts, Parts into Titles, Titles into chapters, chapters into articles, and the *whole* is sectionized consecutively, from the beginning to the end of the Code. Sections have been left in blank at the end of each chapter and article, for future declaration of rules or amendments.

Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States—"American Common Law;" the Common Law of England, as *modified* by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subjects differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

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This "unwritten" law is a system quite complete, but its *expression* is most fragmentary. It is found scattered throughout thousands of volumes of English and American reports and digests, from the Year Books down to the present time. The Civil Law, with Mexican modifications, prevailed in this State up to the time of the adoption of the Common Law. The history of civilization does not furnish a parallel, of placing upon a conquered people a whole system of "unwritten" laws, foreign to them and their language, and which could only be found by searching out its disintegrated elements. The Legislature has never provided for a translation of the Common Law into Spanish. The citizen and the lawyer alike complain over the want of a condensed methodical expression of the law. The Civil Code of New York—a monument of legal wisdom and patient industry—is a collection of Common Law rules and principles, combined with a consolidation of statutes like our own, all concisely stated, logically and harmoniously arranged, in order of subjects corresponding to Blackstone's Commentaries. We "supply the defect" in our Act adopting the Common Law, by specifying the general rules already embraced in its very general terms, and for this purpose avail ourselves of the exhaustive labors of the New York Commission. Most of our statutes have been taken, from time to time, from sister States, and mostly from New York. The chapters on *Special Partnerships* (Stats. 1870, 123) and *Adoption of Children* (Stats. 1870, 530) were taken bodily from the Civil Code of New York.

The sharp lines between statute law and the Common Law, remaining unexpressed in Code form, are toned down. The Code and the Common Law are but harmonious parts of one system, differing only in name—in the terms employed, indicating the different modes of adoption.

The work of revising such of our statutes as pertain to this Code, and giving them conciseness in harmony with the general style of that Code, and of incorporating them in their appro-



priate places, has been performed with all reasonable care. The law on marriage and divorce has been more fully declared; the distinction between sealed and unsealed instruments has been abolished; married women authorized to convey separate property without the signatures of their husbands; conveyances and acknowledgments simplified, and all parts of the Code made to harmonize with these changes. It is believed that in the main the work is well done. Doubtless some defects or omissions will be discovered on final examination after printing as a whole, which the Commission, Committee or Examining Board will correct before presentation to the Legislature in bill form.

The Code can be considered and be accepted or rejected as a *whole*, or those Acts of our statutes which have been revised and incorporated into the Code can be considered and passed by themselves. The Legislature can take its choice as between the *whole* volume or the revised Titles from the statutes. Alternate bills can be prepared to carry out either plan. Those who choose to follow the Commission through this Code should obtain a copy of the New York Civil Code, as a better means of testing the accuracy of our work. Its numerous references to leading cases, in which the particular principle declared has been adjudicated, and the copious notes, afford the highest guarantee of the correctness of that work.

We make acknowledgments to Judges O. C. Pratt, S. H. Dwinelle, E. D. Sawyer and T. Reed; also, to Messrs. Williams and Thornton, S. Wilson and J. B. Harmon, for examinations and suggestions concerning some portions of the work.

CHARLES LINDLEY,  
JNO. C. BURCH,  
CREED HAYMOND,  
Commissioners.

OFFICE REVISION COMMISSION,  
Sacramento, October 2d, 1871.



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## PART III.

### NUISANCE.

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##### II. PUBLIC NUISANCES.

##### III. PRIVATE NUISANCES.

## TITLE I.

### GENERAL PRINCIPLES.

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#### ABBREVIATIONS USED IN THIS VOLUME.

C. C., Civil Code. P. C., Penal Code. C. C. P., Code of Civil Procedure. Pol. C., Political Code. Div., Division. Tit., Title. Chap., chapter. Art., article. Sec., section. Subd., subdivision.

CIVIL CODE  
OF THE  
STATE OF CALIFORNIA.

---

IN FOUR DIVISIONS.



THE  
CIVIL CODE  
OF THE  
STATE OF CALIFORNIA.

---

AN ACT  
TO ESTABLISH A CIVIL CODE.

---

*The People of the State of California, represented in Senate and Assembly, do enact as follows :*

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. Title of Code.

2. When to take effect.
3. Definition of law.
4. Action of sovereign power.
5. The common law the rule of decision.
6. Two kinds of common law.
7. No common law, where the law is declared by this Code.
8. Two kinds of civil rights.
9. Rights, how modified.
10. Divisions of this Code.

SECTION 1. This Act shall be known as the CIVIL CODE Title of Code  
OF THE STATE OF CALIFORNIA.

When to  
take effect.

SEC. 2. This Code shall take effect on the ——— day of ———, eighteen hundred and seventy-two, at twelve o'clock, noon.

N. Y. C. C., Sec. 2034.

Definition  
of law.

SEC. 3. Law is a rule of property and of conduct, prescribed by the supreme power of the State.

N. Y. C. C., Sec. 2.

Action of  
sovereign  
power.

SEC. 4. The will of the sovereign power is expressed—

1. By the Constitution, which is the organic Act of the people.

2. By statutes, which are the Acts of the Legislature, or by the ordinances of other and subordinate legislative bodies.

N. Y. C. C., Sec. 5.

The common  
law rule  
the rule of  
decision.

SEC. 5. The Common Law, as expressed in the decisions of the English and American Courts, and shown in the records, reports and digests thereof, is the rule of decision in all the Courts of this State.

[New section.] Stats. 1850, 219.

NOTE.—Our Act, adopting the common law of England (Stats. 1850, 219), is as follows:

“The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State.”

A strict construction of the words “common law of England,” would have required Courts to follow the English rule, when in conflict with the American; yet it is believed that the latter has had a greater influence in our jurisprudence than the former. The phrase “common law which is expressed in the decisions of the English and American tribunals,” extends the latter so as to include the whole body of the common law, whether found in English or American decisions, and makes it conformable to the construction of that Act.

Cool. Bl. Comm., I, 67, note 3, is as follows:

“The common law includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature. (1 Kent, 468.) The common law of the American States consists of the common law of England, as modified by English statutes previous to the colonization of America, so far as it has been found adapted to our altered condition and circumstances. And those English statutes passed afterwards, at any time prior to the Revolution, which were practically accepted and adopted in America, became also a part of American common law. (See Van Ness vs. Packard, 2 Pet., 144; also, other authorities therein cited.)”



**SEC. 6. The Common Law is divided into—**

Two kinds of  
common law

1. Public law, or the law of nations.
2. Domestic or municipal law.

N. Y. C. C., Sec. 4.

**NOTE.**—Cool. Bl. Comm., I, 69, note 3, is as follows:

“Of the United States, as a nation, there is no common law. The Federal Government is composed of sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law would be made a part of our federal system only by legislative adoption. (McLean, J., in *Wheaton vs. Peters*, 8 Pet., 658, and other authorities therein cited.)”

**SEC. 7. There is no Common Law in any case where the law is declared by this Code.**

No common  
law, where  
the law is  
declared by  
this Code.

N. Y. C. C., Sec. 6.

**SEC. 8. All original civil rights are either—**

Two kinds of  
civil rights.

1. Rights of person; or,
2. Rights of property.

N. Y. C. C., Sec. 7.

**SEC. 9. Rights of person and of property may be waived, surrendered or lost by neglect, in the cases provided by law.**

Rights, how  
modified.

N. Y. C. C., Sec. 8; *Conkling vs. King*, 10 N. Y., 440.

**SEC. 10. This Code has four general divisions:**

Divisions of  
this Code.

1. The first relates to PERSONS.
2. The second, to PROPERTY.
3. The third, to OBLIGATIONS.
4. The fourth contains general provisions relating to PERSONS, PROPERTY and OBLIGATIONS.

N. Y. C. C., Sec. 9.



# **DIVISION FIRST.**

---

**PART I. PERSONS.**

**II. PERSONAL RIGHTS.**

**III. PERSONAL RELATIONS.**

**IV. CORPORATIONS.**



# PART I.

## PERSONS.

### SECTION 17. Minors, who are.

18. Periods of minority, how calculated.
19. Adults, who are.
20. Status of minors, how changed.
21. Unborn child.
22. Persons made adults by other States, considered as such in this State, when domiciled herein.
23. Minors by the laws of other State or country, how considered in this State.
24. Persons of unsound mind.
25. Custody of minors.
26. Minors cannot give a delegation of power.
27. Cannot hold offices of trust; may of skill.
28. Contracts of minors made; disaffirmed.
29. When minor may disaffirm.
30. Cannot disaffirm contract for necessities.
31. Nor certain obligations.
32. Contracts of persons without understanding.
33. Contracts of other insane persons.
34. Powers of persons whose incapacity has been adjudged.
35. Minors liable for wrongs.
36. Not liable for exemplary damages.
37. Minors may enforce their rights.

### SEC. 17. Minors are:

1. Males under twenty-one years of age.
2. Females under eighteen years of age.

Minors, who are.

Stats. 1854, 155; Cool. Bl. Comm., I, 463; N. Y. C. C., Sec. 10.

SEC. 18. The periods specified in the preceding section shall be calculated from the first minute of the day on which persons are born, to the same minute of the corresponding day completing the period of minority.

Periods of minority, how calculated.

[New section.] NOTE.—The first second of the *preceding* day is the common law rule. (Shars. Bl. Comm., I, 463 and note 11.)

### SEC. 19. All other persons are adults.

N. Y. C. C., Sec. 11.

Adults, who are.

Status of  
minors, how  
changed.

SEC. 20. The solemnization of marriage of minors, as provided by Sec. 74, changes their status from minors to adults.

[New section.] Stats. 1858, 108.

NOTE.—The statute embraced only females ; this section extends the privilege to males.

Unborn  
child.

SEC. 21. A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests, in the event of its subsequent birth.

N. Y. C. C., Sec. 12 ; Cool. Bl. Comm., I, 128.

Persons  
made adults  
by other  
states, con-  
sidered as  
such in this  
State, when  
domiciled  
herein.

SEC. 22. Persons made adults by the laws of a State or foreign country in which they were domiciled, are adults in this State when they become domiciled herein.

[New section.] Story on Conflict of Laws, 52 ; Tyler on Infancy and Coverture, 35.

Minors by  
the laws of  
other State  
or country,  
how consid-  
ered in this  
State.

SEC. 23. Minors by the laws of another State or foreign country wherein they have been domiciled, are not deemed adults under this Code, so as to affect or alter their rights in relation to contracts made in such State or foreign country.

[New section.] Story on Conflict of Laws, 69 ; 2 Kent, 234, note C.

Persons of  
unsound  
mind.

SEC. 24. Persons of unsound mind, within the meaning of this Code, are idiots, lunatics, imbeciles and habitual drunkards.

N. Y. C. C., Sec. 13.

Custody of  
minors.

SEC. 25. The custody of minors and persons of unsound mind is regulated by Part III of this Division.

N. Y. C. C., Sec. 14.

Minors can-  
not give a  
delegation  
of power.

SEC. 26. A minor cannot give a delegation of power.

N. Y. C. C., Sec. 15.

Cannot hold  
offices of  
trust ; may  
of skill.

SEC. 27. Minors cannot hold or exercise office which relates to the administration of justice or the custody of public money or property. They may hold and exercise those offices which require only skill and diligence.

[New section.] Tyler on Infancy and Coverture, 37.

Contracts  
of minors  
made ; dis-  
affirmed.

SEC. 28. A minor may make a conveyance or other contract in the same manner as any other person, subject

only to his power of disaffirmance under the provisions of this Title, and to the provisions of the Title on *Marriage*.

N. Y. C. C., Sec. 16; *Magee vs. Walsh*, 18 Cal., 155.

SEC. 29. In all cases other than those specified by Secs. 30 and 31, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives.

When minor may dis-affirm.

N. Y. C. C., Sec. 17; *Hastings vs. Dollarhide*, 24 Cal., 195.

SEC. 30. A minor, or a person of unsound mind of whatever degree, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or for that of his family, entered into by him when not under the care of a parent or guardian able to provide for him.

Cannot dis-affirm contract for necessities.

N. Y. C. C., Sec. 18.

SEC. 31. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

Nor certain obligations.

N. Y. C. C., Sec. 19.

SEC. 32. A person entirely without understanding has no power to contract, except in the case mentioned in Sec. 30, unless expressly authorized by statute.

Contracts of persons without understanding.

N. Y. C. C., Sec. 20.

SEC. 33. A person of unsound mind, but not entirely without understanding, may make a conveyance or other contract, before his incapacity has been judicially determined, subject to rescission, as provided in the chapter on *Rescission*.

Contracts of other insane persons.

N. Y. C. C., Sec. 21.

SEC. 34. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.

Powers of persons whose incapacity has been adjudged

N. Y. C. C., Sec. 22.

Minors liable  
for wrongs.

SEC. 35. A minor, or a person of unsound mind of whatever degree, is liable for a wrong done by him, in like manner with any other person.

N. Y. C. C., Sec. 23.

Not liable for  
exemplary  
damages.

SEC. 36. A minor or person of unsound mind cannot be subjected to exemplary damages, unless at the time of the act he was capable of knowing that it was wrongful.

N. Y. C. C., Sec. 24.

Minors may  
enforce their  
rights.

SEC. 37. A minor may enforce his rights by civil action or other legal proceedings, in the same manner as a person of full age, except that a guardian must be appointed to conduct the same.

N. Y. C. C., Sec. 25.



## PART II.

### PERSONAL RIGHTS.

#### SECTION 43. General personal rights.

- 44. Defamation, what.
- 45. Libel, what.
- 46. Slander, what.
- 47. What communications are privileged.
- 48. Protection to personal relations.
- 49. Right to use force.

SEC. 43. Besides the personal rights mentioned or recognized in the POLITICAL CODE, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

General personal rights.

There is no doubt that persistent public insults, *e. g.*, continually shouting at a person in the street, or even silently dogging him, are personal injuries, against which he ought to be protected. Why is not an act which the law admits *almost* to justify, certainly to mitigate, the crime of assault and battery, sufficient foundation for a civil action? Compare *Adams vs. Rivers* (11 Barb., 390), where an action for use of insulting words, by one standing in the highway in front of plaintiff's land, was sustained on the ground of the trespass involved in standing in the highway after being ordered to depart, for the malicious purpose evinced.

N. Y. C. C., Sec. 27.

#### SEC. 44. Defamation is effected by—

- 1. Libel.
- 2. Slander.

Defamation, what.

In all definitions of libel or slander at common law, malice is treated as a necessary ingredient. But in the absence of a proper notice for the publication, malice is conclusively presumed, and the publisher of a libel is responsible, although clearly free from actual malice (*Hunt vs. Bennett*, 19 N. Y., 173; *Lewis vs. Chapman*, 16 id., 369). In the definitions of both classes of defamation, therefore, the Commissioners omit the ingredient of malice, and consequently the rules concerning presumption of malice.

N. Y. C. C., Sec. 28.

SEC. 45. Libel is a false and unprivileged publication, by writing, printing, picture, effigy or other fixed repre-

Libel, what

sentation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

The law of libel has passed, in the last hundred years, from one extreme to another; from excessive severity to excessive laxity. The abuse of the freedom of the press, not only in the wantonness of its attacks upon public men, but in its assaults upon private citizens, has become so great, that a remedy for the evil must be sought or violence will take the place of law. The license into which this freedom has degenerated leads, not only to the frequent invasion of private rights, but to the corruption of public morals. If the Commissioners had been certain of the true remedy, they would have proposed it in the text of the Code. They will venture only to suggest that a more certain punishment for wanton or careless defamation being needed, a remedy may perhaps be found in affixing to it a penalty, to be recovered in every civil action for libel, in addition to the damages which the jury may find. This would at least render it unsafe for libellers to rely upon the caprice or prejudice of juries as the means of escape with nominal damages. Requiring the name of the writer to be signed to every personal article, might also have a salutary effect. If the Legislature should think these provisions desirable, two sections like the following would answer the purpose :

SEC. —. Any article published in a newspaper, containing matter which would be libellous if it were false, must be signed by the writer, and his name must be published at the foot of the article. A violation of this section is a misdemeanor.

SEC. —. In every civil action for libel, if the plaintiff recovers a verdict, he shall be entitled to judgment against the defendant for ——— dollars, as a penalty, in addition to the damages found by the jury, and the costs of the action.

N. Y. C. C., Sec. 29; Cool. Bl. Comm., I, 133; *ib.*, III, 125; *Thrall vs. Smiley*, 9 Cal., 530; *Maynard vs. Fireman's Fund Insurance Co.*, 34 Cal., 48.

Slander,  
what.

SEC. 46. Slander is a false and unprivileged publication, other than libel, which—

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

2. Imputes in him the present existence of an infectious, contagious or loathsome disease.

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

4. Imputes to him impotence or a want of chastity; or,

5. Which, by natural consequence, causes actual damage.

N. Y. C. C., Sec. 30; Cool. Bl. Comm., I, 153; ib., III, 123; *McDaniel vs. Baca*, 2 Cal., 326; *Butler vs. Howes*, 7 Cal., 87; *Bradley vs. Gardner*, 10 Cal., 371; *Scott vs. Harbor*, 18 Cal., 704.

SEC. 47. A privileged publication is one made—

1. In the proper discharge of an official duty.

2. In testifying as a witness, in any proceeding authorized by law, to a matter pertinent and material, or in reply to a question allowed by the tribunal.

3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information.

4. By a fair and true report in a newspaper, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.

N. Y. C. C., Sec. 31.

What communications are privileged.

SEC. 48. The rights of personal relation forbid—

1. The abduction of a husband from his wife, or of a parent from his child.

2. The abduction or enticement of a wife from her husband, of a child from a parent, or from a guardian entitled to its custody, or of a servant from his master.

3. The seduction of a wife, daughter, orphan sister or servant.

4. Any injury to a servant, which affects his ability to serve his master.

N. Y. C. C., Sec. 32; Cool. Bl. Comm., III, 138, 141.

Protection to personal relations.

SEC. 49. Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent or other relative to the third degree, a ward, servant or master.

N. Y. C. C., Sec. 33.

Right to use force.



# PART III.

## PERSONAL RELATIONS.

### TITLE I. MARRIAGE.

#### II. PARENT AND CHILD.

#### III. GUARDIAN AND WARD.

#### IV. MASTER AND SERVANT.

---

## TITLE I. .

### MARRIAGE.

#### CHAPTER I. THE CONTRACT OF MARRIAGE.

##### II. DIVORCE.

##### III. HUSBAND AND WIFE.

---

### CHAPTER I.

#### THE CONTRACT OF MARRIAGE.

##### ARTICLE I. VALIDITY OF MARRIAGE.

##### II. AUTHENTICATION OF MARRIAGE.

---

### ARTICLE I.

#### VALIDITY OF MARRIAGE.

##### SECTION 55. What constitutes marriage.

56. Minors capable of contracting marriage.

57. Marriage, how manifested and proved.

58. When void.

59. Incompetency of parties to.

60. Of whites and negroes or mulattoes, void.

61. Polygamy forbidden.

62. Pardon does not restore marital rights.

63. Marriage contracts subject to the same rules as other contracts.

64. Marriage contracted without the State.

What constitutes marriage.

SEC. 55. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, as provided in Sec. 74, or by a mutual assumption of marital rights, duties or obligations.

[New section.] Const. of Cal., Art. XI, Sec. 12; "Marriage," Sec. 1; Cool. Bl. Comm., I, 433 and note 2, and 437; *Graham vs. Bennett*, 2 Cal., 503; *Letters vs. Cady*, 10 Cal., 533.

NOTE.—In *Graham vs. Bennett*, above cited, it is held that "an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding."

As to whether consent alone constitutes marriage: In *Jewell's Heirs vs. Jewell* (1 How., 219) the Court was equally divided. In *Regina vs. Millis* (10 Jeb. and Fin., 534) the House of Lords, on appeal from Ireland, was also equally divided on the same question—Lords Brougham, Denman and Campbell in favor, and Lords Lynhurst, Coltenham and Abinger against it. On reference of the question to the Court, Tindal, C. J., gave the unanimous opinion of the Court that it was not a valid marriage, and held "that by the law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de praesenti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law." (Parsons on Contracts, p. 78 and notes.)

The declaration of marriage and actions to establish marriage, provided for in this chapter, correspond to this right of solemnization.

Secs. 34 and 37 of the New York Civil Code are as follows:

"SEC. 34. Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is alone necessary.

"SEC. 37. The consent to a marriage must be to one commencing instantly, and not to an agreement to marry afterwards."

Minors capable of contracting marriage.

SEC. 56. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

N. Y. C. C., Sec. 36; Cool. Bl. Comm., I, 435.

**NOTE.**—Our statute provides that “no person shall be joined in marriage unless they shall have first obtained a license,” which must show proper age, consent, etc. Upon this class of statutes, Parsons on Contracts says: “The English statute makes the marriage of minors, without such consent, absolutely void. In this country, that would depend upon the statutes of the several States. Generally, if not universally, the marriage would be held valid, although the person celebrating it might be punishable,” and cites *Parton vs. Hervey*, 1 Gray, 119.

The Commission dare not make serious changes affecting the law of marriages, yet it would seem that to permit boys and girls, fourteen and twelve years old, to become husband and wife, without the consent of parents or guardians, and take upon themselves all the responsibilities which belong to that relation, and, through it, to society, is so shocking to common sense and popular judgment, and so dangerous to the well-being of the parties themselves, that some better limit ought to be established. Either raise the age of consent to fifteen and eighteen, or make the marriage *absolutely void*, if consummated without the consent of parents or guardians, or a Probate Court.

The civil law made naked consent to constitute marriage, yet that included the consent of parents or tutors, without which the marriage was void. France has in a measure retained this law, requiring all males under twenty-five and all females under twenty-one to obtain the consent of parents or guardians before contracting marriage.

It is substantially the same in Holland. English statutes make such marriage *void*. But by 19 and 20 Vic., Chap. 119, Sec. 17, they are valid *if actually solemnized* without consent. (Cool. Bl. Comm., 437 and note 12.)

**FINAL NOTE.**—In final review, the Commission has concluded to raise the ages of consent to *fifteen* in females and *eighteen* in males.

**SEC. 57.** Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. Cohabitation, admissions of the parties, general reputation, being received as husband and wife in society, public houses or private families, and all other pertinent circumstances, are competent evidence to prove marriage.

Marriage,  
how mani-  
fested and  
proved.

[New section.]

*People vs. Anderson*, 26 Cal., 129; *Parsons on Contracts*, p. 77 and note; *Starr vs. Peck*, 1 Hill, p. 270; *Clayton vs. Wardell*, 4 N. Y., 230; *Case vs. Case*, 17 Cal., 598.

**NOTE.**—Sec. 35, New York Civil Code, is as follows: “Consent to a marriage may be manifested in any form, and may be proved like any other fact.”

When void.

SEC. 58. If either party to a marriage is incapable of consent for want of age or understanding, or is incapable, from physical cause, of entering into the marriage state, or if the consent of either is obtained by fraud or force, the marriage is void.

N. Y. C. C., Sec. 39 ; Cool. Bl. Comm., I, 435.

NOTE.—This is the rule in *Graham vs. Bennett* (2 Cal., 503), but *contra* in *Baker vs. Baker* (13 Cal., 87). Fraud “vitiates it *ab initio*, and authorizes a divorce.”

The above note was appended to the section as first printed—taken from the New York Civil Code, which avoided the marriage from date of decree.

Incompetency of parties to.

SEC. 59. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as of the whole blood, are incestuous, and void from the beginning; whether the relationship is legitimate or illegitimate.

N. Y. C. C., Sec. 38 ; “Marriage,” Sec. 2.

Of whites and negroes or mulattoes void.

SEC. 60. All marriages of white persons and negroes or mulattoes are illegal and void.

“Marriage,” Sec. 3.

Polygamy forbidden.

SEC. 61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless—

1. The former marriage had been annulled or dissolved for some cause other than the adultery of such person; or,

2. Unless such former husband or wife had been finally sentenced to imprisonment for life; or,

3. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage; in which case the subsequent marriage is void only from the time its nullity is adjudged by a competent tribunal.

N. Y. C. C., Sec. 40 ; Cool. Bl. Comm., I, 435 ; *Bowers vs. Bowers*, 9 N. Y. Lg. Ols.

Pardon does not restore marital rights.

SEC. 62. No pardon granted to any person sentenced to imprisonment for life in this State, restores such person to the rights of any previous marriage, or to the guardianship of any issue of such marriage.

N. Y. C. C., Sec. 41.



**Sec. 63.** A promise of marriage is subject to the same rules as contracts in general, except that neither party is bound by a promise made in ignorance of the other's want of personal chastity, and that either is released therefrom by unchaste conduct on the part of the other.

Marriage contracts, subject to the same rules as other contracts.

N. Y. C. C., Sec. 44.

**Sec. 64.** All marriages contracted without this State, which would be valid by the laws of the country in which the same were contracted, shall be valid in this State.

Marriage contracted without the State.

"Marriage," Sec. 5.

## ARTICLE II.

### AUTHENTICATION OF MARRIAGE.

**Section 68.** Marriage, how solemnized.

- 69. Marriage license.
- 70. By whom solemnized.
- 71. No particular form of solemnization.
- 72. Substantial requisites.
- 73. Certificate of marriage.
- 74. Certificate to parties and Recorder.
- 75. Declaration of marriage, how made.
- 76. Action to affirm unsolemnized marriages.

**Sec. 68.** Marriage must be licensed, solemnized, authenticated and recorded as provided in this article; but non-compliance with its provisions does not invalidate any lawful marriage, but subjects the offenders to the penalty prescribed in the PENAL CODE.

Marriage, how solemnized.

**Sec. 69.** All persons about to be joined in marriage must first obtain a license therefor from the Clerk of the County Court of the county in which the marriage is to be celebrated, showing—

Marriage license.

1. The identity of the parties.
2. Their real and full names and places of residence.
3. That they are of sufficient age to be capable of contracting marriage.
4. If the male is under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother or guardian, if any such is given; or that such non-aged person has been previously but is not at the time married.

For the purpose of ascertaining these facts, the Clerk is

authorized to examine parties and witnesses on oath, and receive and read affidavits. He shall state such facts in the license.

"Marriage," Sec. 7 ; N. Y. C. C., Sec. 47.

By whom  
solemnized.

SEC. 70. Marriage must be solemnized by either a Supreme, District or County Judge, Justice of the Peace, Mayor, priest, or minister of the gospel of any denomination.

"Marriage," Sec. 7 ; N. Y. C. C., Sec. 45.

No particu-  
lar form of  
solemniza-  
tion.

SEC. 71. No particular form for the ceremony of marriage is required, but the parties must solemnly declare, in the presence of the person solemnizing the marriage, and of at least one witness, that they take each other as husband and wife.

N. Y. C. C., Sec. 46.

Substantial  
requisites.

SEC. 72. The person solemnizing a marriage must first require the presentation of the marriage license, and satisfy himself that it substantially conforms to Sec. 69, and that the facts set forth in it are true. For this purpose he may rely upon the license or may administer oaths and examine the parties and witnesses in like manner as the County Clerk, before issuing the license.

[New section.] Based on "Marriage," Secs. 7, 8.

NOTE.—Sec. 47, New York Civil Code, changed to conform to our license system. It is also intended to give authority to revise the license of the Clerk in cases where there are suspicions of fraud.

Certificate of  
marriage.

SEC. 73. The person solemnizing a marriage must make, sign and indorse upon or attach to the license a certificate, showing—

1. That he believes the facts stated to be true, and that upon due inquiry there appears to be no legal impediment to the marriage.

2. The names and places of residence of one or more witnesses to the ceremony.

3. The fact, time and place of solemnization.

[New section.] Based on "Marriage," Sec. 8.

Certificate to  
parties and  
Recorder.

SEC. 74. He must, at the request of and for either party, make a certified copy of the license and certificate, and file the originals with the County Recorder within

thirty days after the marriage, which must be recorded as provided in Sec. —, POLITICAL CODE.

[New section.] Based on "Marriage," Sec. 8.

SEC. 75. Persons married under the provisions of Sec. 55, and without the solemnization as provided in Sec. 70, must jointly make a declaration of marriage, showing—

Declaration  
of marriage,  
how made.

1. The names, ages and residence of the parties.
2. The time of marriage, as nearly as practicable.
3. That the marriage has not been solemnized as required by Sec. 70.

It must be signed by the parties making it, and acknowledged in like manner as conveyances of land by the husband, and filed with the County Recorder, to be recorded in like manner as solemnized marriages.

[New section.] NOTE.—The following section for the Penal Code has been prepared, as a means of enforcing compliance with the preceding:

"If persons who are married under the provisions of Sec. 55, and whose marriage is not solemnized as provided in Sec. —, shall not make, acknowledge and file with the County Recorder a declaration of marriage as provided in Sec. 70, within one year after such marriage, dating from the consent thereto, they are guilty of a misdemeanor. If one party to the marriage consents and proposes to make the declaration and the other refuses or neglects to make it, the party refusing or neglecting is alone guilty of the offence provided for in this section."

SEC. 76. If either party to an unsolemnized marriage refuses to join in a declaration of marriage, as provided in Sec. 75, the other party may institute an action in the District Court for the purpose of establishing the marriage, and upon a proper showing, and by proceedings provided in the CODE OF CIVIL PROCEDURE, shall obtain a judgment affirming the validity of such marriage.

Action to  
affirm un-  
solemnized  
marriages.

[New section.] NOTE.—These two sections and penal section in note are substitutes for the vicious proviso at the end of Sec. 7 (Stats. 1863, 244). They are intended, with the penal section, equally for the protection of the parties to a marriage and society. Families and the public have a right to know who are married, though they may not always know who are living in illicit intercourse. See note to Sec. 55 for the English provision for enforcing the solemnization of marriage.

## CHAPTER II.

## DIVORCE.

## ARTICLE I. NULLITY.

## II. DISSOLUTION.

## III. CAUSES FOR DENYING DIVORCE.

## IV. GENERAL PROVISIONS.

## ARTICLE I.

## NULLITY.

## SECTION 82. Cases where marriage may be annulled.

83. Action to obtain decree of nullity in certain cases, when and by whom commenced.

84. Children of annulled marriage.

85. Custody of children.

86. Effect of judgment of nullity.

Cases where marriage may be annulled.

SEC. 82. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party seeking to have the marriage annulled was under the age of legal consent; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife.

4. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

6. That either party was, at the time of marriage, physically incapable of entering into the married state; and such incapacity continues, and appears to be incurable.

N. Y. C. C., Sec. 54; 1 Cool. Bl. Comm., 435-440. Antenuptial fraud, *Baker vs. Baker*, 13 Cal., 87. Previous marriage, *Fuller vs. Fuller*, 17 Cal., 605.

**NOTE.**—Subd. 3 of Sec. 54 (N. Y. C. C.), and Subd. 2 Sec. 4, “Divorces” (Statutes), are substantially the same. They both provide for nullity of marriage of females married under fourteen, without consent of parents or guardians. The provision is omitted, as being in conflict with the recognized capacity to contract marriage at twelve years of age.

**SEC. 83.** An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods, and by the parties, as follows :

Action to obtain decree of nullity in certain cases, when and by whom commenced.

1 For causes mentioned in Subd. 1: by either party to the marriage, or by a guardian or relative, within five years after arriving at the age of consent.

2. For causes mentioned in Subd. 2: by the party injured, within five years after discovering the fact of previous marriage; or by the former husband or wife, within five years after discovering the fact of subsequent marriage.

3. For causes mentioned in Subd. 3: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

4. For causes mentioned in Subd. 4: by the party injured, within five years after the discovery of the facts constituting the fraud.

5. For causes mentioned in Subd. 5: by the injured party, within five years after the marriage.

6. For causes mentioned in Subd. 6: by the injured party, within five years after the marriage.

[New section.] Based on N. Y. C. C., Sec. 55.

**SEC. 84.** Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the judgment must be specified in the judgment, and are entitled to succeed, in the same manner as legitimate children, to the estate of the parent who, at the time of the marriage, was competent to contract.

Children of annulled marriages.

N. Y. C. C., Sec. 56.

Custody of  
children.

. SEC. 85. The Court must award the custody of the children of a marriage annulled on the ground of fraud or force, to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

N. Y. C. C., Sec. 57.

Effect of  
judgment  
of nullity.

SEC. 86. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

N. Y. C. C., Sec. 58.

## ARTICLE II.

### DISSOLUTION OF MARRIAGE.

#### SECTION 90. Marriage, how dissolved.

91. Divorce, what.
92. Causes for divorce.
93. Adultery defined.
94. Extreme cruelty, what.
95. Desertion, what.
96. Desertion, how manifested.
97. In case of stratagem or fraud, who commits desertion.
98. In case of cruelty, where one party leaves the other, who commits desertion.
99. Separation by consent not desertion.
100. Intent not to be inferred.
101. Separation and intent to desert not always coincident.
102. Consent to separate revocable.
103. Desertion, how cured. Effect of refusing condonation.
104. Wife must abide by husband's selection of home, or it is desertion on her part.
105. If the place is unfit, and wife refuses to conform, it is desertion by the husband.
106. Wilful neglect, what.
107. Habitual intemperance, what.
108. Felony, what.

Marriage,  
how dis-  
solved.

SEC. 90. Marriage may be dissolved—

1. By the death, or sentence to imprisonment for life, of either of the parties; or,
2. By a divorce adjudged by a Court of competent jurisdiction.

N. Y. C. C., Sec. 59.

Divorce,  
what

SEC. 91. Divorce is a judgment dissolving the marriage and restoring the parties to the status of unmarried persons.

[New section.]

**SEC. 92.** Divorces must be granted for any of the following causes : Causes for divorce.

1. Adultery.
2. Extreme cruelty.
3. Wilful desertion.
4. Wilful neglect to provide for the wife.
5. Habitual intemperance.
6. Conviction of felony.

[New section.] Based on "Divorces," Sec. 4.

**SEC. 93.** Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Adultery defined.

[New section.] Bouv. Law Dict., "Adultery," p. 92.

**SEC. 94.** Extreme cruelty is such conduct in one of the married parties as renders a continuance of the cohabitation either so dangerous to the other in fact, or attended with such reasonable apprehension in the mind of danger to the physical existence or comfort, as to demand a separation on the ground of the real physical safety of the other; or of the mental and physical capacity in the other to discharge well the duties of husband or wife. Extreme cruelty, what

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 717; Stats. 1851, 186; 1870, 291; Powelson vs. Powelson, 22 Cal., 358; Mahone vs. Mahone, 19 Cal., 626; Morris vs. Morris, 14 Cal., 76; Johnson vs. Johnson, 14 Cal., 459.

**NOTE.**—Statutes of 1851, 186, authorizes divorce for "extreme cruelty;" of 1870, 291, for "extreme cruelty by inflicting upon the other grievous bodily injury or mental suffering." Mr. Bishop, in his work above cited, has made three exhaustive trials to define the term; one in his first edition, another in the third, and a final in the fourth. The final has been adopted as Sec. 94.

**SEC. 95.** Wilful desertion is the voluntary separation one year of one of the married parties from the other, or the voluntary refusal one year to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other. The fact of separation and the intent to desert must coexist. Desertion, what.

[New section.] Bish. on Mar. and Div., I, Sec. 776; Stats. 1851, 186; 1870, 291; Conant vs. Conant, 10 Cal., 249; Hardenburg vs. Hardenburg, 14 Cal., 654; Morrison vs. Morrison, 20 Cal., 431; Benkert vs. Benkert, 32 Cal., 467.

Desertion,  
how mani-  
fested.

**SEC. 96.** Wilful desertion may be manifested by—

1. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary; or,

2. Refusal of the deserting party to dwell in the same house with the other party, when there is no just cause for such refusal; or,

3. Prolonged voluntary absence without apparent cause.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 777, and note;  
Morrison vs. Morrison, 20 Cal., 231.

**NOTE.**—Subd. 1 is intended to settle a question stated as doubtful in Bishop on Marriage and Divorce (4th ed.), 778–782. It reaches a class of cases not covered by the second subdivision. The term “matrimonial intercourse” is used as a more agreeable expression than “sexual intercourse,” both having the same legal significance, according to authorities cited in note 1, Sec. 777, of the work above cited. Use of the word *cohabited* is avoided for its uncertainties. See same work.

In case of  
stratagem or  
fraud, who  
commits  
desertion.

**SEC. 97.** When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

[New section.] Bish. on Mar. and Div., Sec. 784.

In case of  
cruelty,  
where one  
party leaves  
the other,  
who commits  
desertion.

**SEC. 98.** Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party.

[New section.] **NOTE.**—This section is intended to settle a question discussed as doubtful in Bishop on Marriage and Divorce, Secs. 787, 791, 794.

Separation  
by consent  
not deser-  
tion.

**SEC. 99.** Separation by consent, with or without the understanding that one of the parties will apply for divorce, is not desertion.

[New section.] Bish. on Mar. and Div. (4th ed.) Sec. 783.

Intent not to  
be inferred.

**SEC. 100.** Intent to desert cannot be inferred from the naked fact of living apart, but such fact, accompanied by



other circumstances or prolonged voluntary absence without apparent cause, may establish the intent.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 783.

SEC. 101. The separation and intent to desert are not always coincident. Temporary absence or separation, proper in itself, may be converted into desertion whenever the intent to desert is fixed during such absence or separation.

Separation and intent to desert not always coincident.

[New section.] Bish. on Mar. and Div., Sec. 784.

SEC. 102. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration but the other refuses it, such refusal is desertion.

Consent to separate revocable.

[New section.] Bish. on Mar. and Div., Sec. 786.

SEC. 103. If one party deserts the other, and before the expiration of the statutory period required to make the desertion complete, truly repents, returns and offers, in good faith, to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, it is desertion by such party from the time of refusal.

Desertion, how cured.

Effect of refusing condonation.

[New section.] Bish. on Mar. and Div., Sec. 786; Benkert vs. Benkert, 32 Cal., 467.

SEC. 104. The place and mode of living should be mutually agreed upon by the parties, but if they fail to agree the husband may choose any reasonable place or mode, as provided in Sec. 156, and if the wife does not conform thereto, it is desertion.

Wife must abide by husband's selection of home, or it is desertion on her part.

[New section.] Bish. on Mar. and Div., Sec. 788; N. Y. C. C., Secs. 75, 76; Hardenburg vs. Hardenburg, 14 Cal., 654.

SEC. 105. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband, from the time her reasonable objections are made known to him.

If the place is unfit, and wife refuses to conform, it is desertion by the husband.

[New section.]

SEC. 106. Wilful neglect is the neglect of the husband, for one year, to provide for his wife the common necessities of life, having the ability to provide them, or failing

Wilful neglect, what.

to do so by reason of his idleness, profligacy or dissipation.

[New section.] Stats. 1870, 291; Washburn vs. Washburn, 9 Cal., 475.

Habitual  
intemper-  
ance, what.

SEC. 107. Habitual intemperance is that degree of intemperance, for one year, from the habitual use of intoxicating drinks, which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

[New section.] Stats. 1851, 186; 1870, 291; Mahone vs. Mahone, 19 Cal., 626; Bish. on Mar. and Div. (4th ed.), Sec. 813.

NOTE.—The last clause of the section is new. It speaks for itself. The presence of an habitual drunkard *at home*, casting reproaches and indignities upon his wife, *ought* to be a better cause of divorce than being drunk at his place of business.

Felony,  
what.

SEC. 108. Felony, as a ground of divorce, is a crime for which the judgment or sentence is imprisonment in the State Prison for a period less than for life. Sentence for a life period dissolves the marriage by operation of law.

[New section.]

### ARTICLE III.

#### CAUSES FOR DENYING DIVORCE.

SECTION 112. Divorces denied, on showing what.

113. Connivance, what.

114. Corrupt consent, how manifested.

115. Collusion, what.

116. Condonation, what.

117. Requisites to condonation.

118. Evidence of condonation.

119. Condonation, when operates to bar divorce.

120. Concealment of facts in certain case makes condonation void.

121. Condonation, how revoked.

122. Recrimination, what.

123. Condonation in a recriminatory defence a bar to such defence, when.

124. Divorces denied, when.

125. Lapse of time establishes certain presumptions.

126. Presumptions may be rebutted.

127. Limitation of time.

128. Divorces granted, when.

**SECTION 129.** Proof of actual residence required. Presumptions do not apply.

130. Additional rules of practice in divorce cases.

131. Additional affirmative statements required in complaint.

132. Divorce not to be granted by default, etc.

**SEC. 112.** Divorces must be denied upon showing—

Divorces  
denied, on  
showing  
what.

1. Connivance; or,
2. Collusion; or,
3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time.

[New section.] Bish. on Mar. and Div., Secs. 28, 36, 74.

**SEC. 113.** Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce.

Connivance,  
what.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 5.

**SEC. 114.** Corrupt consent is manifested by passive permission with intent to connive at or actively procure the commission of the acts complained of.

Corrupt con-  
sent, how  
manifested.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 6.

**SEC. 115.** Collusion is an agreement between husband and wife, that one of them shall commit, or appear to have committed, or to be represented in Court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

Collusion,  
what.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 28.

**SEC. 116.** Condonation is the conditional forgiveness of a matrimonial offence constituting a cause of divorce.

Condonation,  
what.

[New section.] Benkert vs. Benkert, 32 Cal., 467.

**SEC. 117.** The following requirements are necessary to condonation :

Requisites to  
condonation.

1. A knowledge on the part of the condonor of the facts constituting the cause of divorce.
2. Reconciliation and remission of the offence by the injured party.
3. Restoration of the offending party to all marital rights.
4. An implied condition subsequent, that the forgiving party shall be treated with conjugal kindness.

[New section.] Bish. on Mar. and Div., Secs. 53, 71

Evidence of  
condonation.

SEC. 118. Where the cause of divorce consists of a course of offensive conduct covering the prescribed statutory period, or arising, in case of cruelty, from successive acts of ill treatment which may, aggregately, constitute the offence, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any part of the facts or period constituting such causes, unless accompanied by an express agreement to condone.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 50.

Condonation, when  
operates to  
bar divorce.

SEC. 119. In cases mentioned in the last section, only after the cause of divorce has become complete, as to the acts complained of and the period of their continuance, can condonation be made that will operate to bar divorce or exclude evidence covering any portion of the acts or time relied upon to constitute the cause. Even in such cases, further efforts to live with and reform the offending party must not, unsupported by an express agreement of condonation made without undue influence, be construed as evidence of condonation.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 63, "Though such party might be willing to give the other a fair trial of future matrimonial fidelity, if sure of retaining his remedy," yet would not, if the remedy was in danger of being lost in such trial.

Concealment  
of facts in  
certain case  
makes con-  
donation  
void.

SEC. 120. A fraudulent concealment, by the condonee, of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, makes void such condonation.

Bish. on Mar. and Div. (4th ed.), Secs. 65, 66; Dempster vs. Dempster, 2 Swab. & T., 438, 44.

Condonation, how  
revoked.

SEC. 121. Condonation is revoked, and the original cause of divorce revived—

1. When the condonee commits acts constituting a like or other cause of divorce; or,

Palmer vs. Palmer, 2 Swab. & T., 61, 62; Bish. on Mar. and Div., Sec. 64.

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled.

Bish. on Mar. and Div., Sec. 53; Durant vs. Durant, 1 Hag. Ec., 773, 3 Eng. Ec., 310; D'Aguilar vs. D'Aguilar, 1 Hag. Ec., 773, 3 Eng. Ec., 329; Bramwell vs. Bramwell, 3 Hag. Ec., 618; Johnson vs. Johnson, 4 Paige, 460; Benkert vs. Benkert, 32 Cal., 467.

NOTE.—As to Subd. 2, Mr. Bishop, above cited, says: "The difference of opinion among judges and lawyers relate to the latter [this] branch of the proposition." It is best to settle the question.

SEC. 122. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

Recrimination, what.

[New section.] 2 Bish. on Mar. and Div., Sec. 75.

NOTE.—This simple section settles many conflicting points arising from the practice of leaving with the Courts a wide discretion as to what degree of bad conduct or what degree of proof of causes of divorce shall be required when they are shown in recrimination, or whether unlike causes of divorce can be so shown.

SEC. 123. Condonation of a cause of divorce shown in the answer as a recriminatory defence is a bar to such defence when the condonee has fully performed the marital duties, and is without reproach since the condonation; or, if three years or more has elapsed after the condonation and before the accruing or completion of the cause of divorce, against which the recrimination is shown.

Condonation in a recriminatory defence a bar to such defence, when.

[New section.] Bish. on Mar. and Div., Secs. 97-100.

NOTE.—The difficulty of this subject will be better comprehended by reading the sections above cited. It would seem better to have some rule, even if it sometimes works a hardship, than to have confusion arising from deciding each case upon its own merits.

SEC. 124. A divorce must be denied—

Divorces denied, when.

1. When the cause is adultery and the action is not commenced within five years after the commission of the act of adultery, or after its discovery by the injured party; or,

2. When the cause is conviction of felony, and the action is not commenced before the expiration of one year after the termination of the period of sentence.

3. In all other cases, when there is an unreasonable

lapse of time after the commission of the offence and before the commencement of the action.

[New section.]

Lapse of time establishes certain presumptions.

SEC. 125. Lapse of time is such an unreasonable delay in commencing the action as establishes the presumption that there has been connivance, collusion in or condonation of the offence, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offence.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 108.

Presumptions may be rebutted.

SEC. 126. The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 106.

Limitation of time.

SEC. 127. There are no limitations of time for commencing actions for divorce, except such as are contained in Sec. 124. The provisions of the CODE OF CIVIL PROCEDURE do not apply to actions for divorce, so far as they relate to the limitations of such actions.

[New section.] NOTE.—At present there is no specific limitation in divorce cases. The only statute upon the subject is the Act of 1850 (Stats. 1850, 343), as follows :

“An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.”

The New York Civil Code provides four years limitation in cases of adultery. Upon a careful examination of the laws of the different States upon the subject, it appears very difficult to establish any exact rule of time, however desirable such a rule might be. There are so many instances of efforts at reformation—so much waiting and hoping before finally attempting to break, judicially, the marriage relation—that any arbitrary rule which would *force the party to commence an action* or lose the remedy, would defeat the discharge of the most Christian duties arising from the relation or deprive the party of all relief when all efforts fail. This section (lapse of time) is substantially the present English statute, as expanded by rules which have been established by the Courts in its construction.

See *Pellew vs. Pellew*, 1 Swab. and Trist., p. 553 ; also, *Matthews vs. Matthews*, 1 Swab. and Trist., p. 499.

Divorces granted, when.

SEC. 128. A divorce must be granted only—

1. When the marriage took place in this State ; or,
2. When both husband and wife were actual inhabitants

of this State at the time of the commission of the acts constituting the cause of divorce; or,

3. When the injured party, at the time of the commission of the acts and at the commencement of the action, was an actual inhabitant of this State; or,

4. When the acts were committed in this State, and the injured party, at the commencement of the action, was an actual inhabitant of this State; or,

5. When the plaintiff has been an actual inhabitant of this State one year next preceding the commencement of the action, and the cause of divorce is extreme cruelty, wilful neglect, wilful desertion or habitual intemperance, and any part of the course of conduct or statutory period of time required to make the offence complete, has occurred or elapsed in this State and a part in another State.

**NOTE.**—New York Civil Code, Sec. 60. First paragraph omitted, the rest enlarged to extend to all cases, instead of being limited to adultery. Subd. 5 is new.

**SEC. 129.** In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence and not upon legal presumptions.

Proof of actual residence required. Presumptions do not apply.

*Kashaw vs. Kashaw*, 3 Cal., 312; N. Y. C. C., Sec. 711; Bish. on Mar. and Div., Secs. 124–131.

**SEC. 130.** The rules of practice in actions for divorce, are those embraced in the CODE OF CIVIL PROCEDURE, with the following additional requirements: When service of summons is made by publication, under the provisions of Secs. 411 and 412, CODE OF CIVIL PROCEDURE, the Court, before making the order for the publication of summons, must examine the plaintiff as to the residence of the defendant, and may require affidavits and make such further orders for the publication of summons in newspapers published at or near the place of marriage and of last domicile, as may be deemed necessary to secure notice to the defendant. No divorce shall be granted until proof is made of personal service on defendant or compliance with such orders of publication.

Additional rules of practice in divorce cases.

Additional  
affirmative  
statements  
required in  
complaint.

SEC. 131. In addition to the allegations of the complaint required by the CODE OF CIVIL PROCEDURE, the plaintiff must affirmatively state that there has been no connivance, collusion, condonation, recrimination, limitation nor lapse of time sufficient to bar the action. These statements are presumptively true; but the contrary being proved, a decree of divorce must be denied.

NOTE.—This section has been prepared on recommendation of Hon. S. H. Dwinelle, Judge of the Fifteenth District Court, to enable the Court to have a basis for denying divorce, where there is no answer filed. Both the preceding sections should be transferred to the Code of Civil Procedure before adoption by the Legislature.

Divorce not  
to be granted  
by default,  
etc.

SEC. 132. No divorce shall be granted upon the default of the defendant, or upon the statement, admission or uncorroborated testimony of the parties, or upon any statement or finding of fact made by a referee, but the Court must require proof of the facts alleged, which proof, if taken before a referee, must be upon written questions and answers.

“Divorces,” Sec. 8; 13 Cal., 87.

#### ARTICLE IV.

##### GENERAL PROVISIONS.

SECTION 136. Relief may be adjudged in some cases, where separation is denied.

137. Expense of action.

138. Orders respecting custody of children.

139. Support of wife and children on divorce or separation granted to wife.

140. Security for maintenance and alimony.

141. Court shall resort to what, in executing certain sections.

142. If wife has sufficient for her support, Court may withhold allowance.

143. Common and separate property may be subjected to support and educate children.

144. When wife shall support husband out of her separate property.

145. Legitimacy of issue.

146. Same.

147. Disposition of common property on divorce.

148. How disposed of when divorce rendered on adultery as a cause.

149. Such an action subject to revision on appeal.



**SEC. 136.** Though judgment of divorce is denied, the Court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.

N. Y. C. C., Sec. 68.

Relief may be adjudged in some cases where separation is denied.

**SEC. 137.** While an action for divorce is pending, the Court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.

N. Y. C. C., Sec. 71.

Expense of action.

**SEC. 138.** In an action for divorce, the Court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

N. Y. C. C., Sec. 72.

Orders respecting custody of children.

**SEC. 139.** Where a divorce is granted for an offence of the husband, the Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife, for her support during her life, or for a shorter period, as the Court may deem just, having regard to the circumstances of the parties respectively; and the Court may, from time to time, modify its orders in these respects.

N. Y. C. C., Sec. 73.

Support of wife and children on divorce or separation granted to wife.

**SEC. 140.** The Court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

N. Y. C. C., Sec. 74.

Security for maintenance and alimony.

**SEC. 141.** In executing the five preceding sections the Court must resort—

1. To the common property; then,
2. To the separate property of the husband.

[New section.]

Court shall resort to what, in executing certain sections.

**SEC. 142.** When the wife has either a separate estate or an interest in common property sufficient to give her

If wife has sufficient for her support, Court may withhold allowance.

alimony or a proper support, the Court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

[New section.]

Common and separate property may be subjected to support and educate children.

SEC. 143. The common property of husband and wife, and the separate property of each, may be subjected to the support and education of the children in such proportions as the Court deems just.

[New section.]

When wife shall support husband out of her separate property.

SEC. 144. Either without divorce or with divorce, when the wife is the offending party she shall support the husband out of her separate property, when he has no separate estate and when they have no common property, and when he is not able or competent, from infirmities, to support himself.

[New section.]

Legitimacy of issue.

SEC. 145. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage, begotten of the wife before the commencement of the action, is not affected.

N. Y. C. C., Sec. 62.

Same.

SEC. 146. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the Court, upon the evidence in the case. In every such case, all children begotten before the commencement of the action are to be presumed legitimate until the contrary is shown.

N. Y. C. C., Sec. 63.

Disposition of common property on divorce.

SEC. 147. In case of the dissolution of the marriage by decree of any Court of competent jurisdiction, the common property must be equally divided between the parties, and the Court granting the decree must make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require.

Stats. 1850, 254, Sec. 12.

**Sec. 148.** When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the common property as the Court granting the decree may, in its discretion, from the facts of the case, deem just.

How disposed of when divorce rendered on adultery as a cause.

Stats. 1850, 254, Sec. 12.

**Sec. 149.** The order for the disposition of the common property under the preceding section is subject to revision on appeal, in all respects, including the exercise of discretion by the Court below.

Such an action subject to revision on appeal.

Stats. 1850, 254, Sec. 12.

### CHAPTER III.

#### HUSBAND AND WIFE.

**Section 155.** Mutual obligations of husband and wife.

156. Rights of husband, as head of family.

157. In other respects, their interests separate.

158. Husband and wife may make contracts.

159. How far may impair their legal obligations.

160. Consideration for agreement of separation.

161. May be joint tenants, etc.

162. Separate property of the wife.

163. Separate property of the husband.

164. Common property.

171. Inventory of separate property of wife.

172. Filing inventory, notice of wife's title.

173. Non-entry of property therein prima facie evidence that it is not common property.

174. Earnings of wife not liable for debts of husband.

175. Earnings of wife, when living separate, separate property.

176. Liability for debts of wife contracted before marriage.

177. Wife's property not liable for debts of the husband, but liable for her own debts.

178. Power of the husband over common property.

179. Courtesy and dower not allowed.

180. Neither answerable for the acts of the other.

181. Support of wife.

182. Husband not liable when abandoned by wife.

183. Rights of husband and wife governed by what.

184. Marriage settlement contracts, how executed.

185. To be acknowledged and recorded.

186. Effect of recording.

187. Minors may make marriage settlements.

188. Rights of married woman as sole trader.

Mutual obligations of husband and wife.

SEC. 155. Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

N. Y. C. C., Sec. 75.

Rights of husband, as head of family.

SEC. 156. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

N. Y. C. C., Sec. 76.

In other respects, their interests separate

SEC. 157. Except as mentioned in Sec. 158, neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

N. Y. C. C., Sec. 78.

Husband and wife may make contracts.

SEC. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on *Trusts*.

N. Y. C. C., Sec. 79.

How far may they impair their legal obligations.

SEC. 159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, as provided in Sec. 158, and except that they may agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

"Marriage," Secs. 14, 15, 22, 23; N. Y. C. C., Sec. 80; *Beach vs. Beach*, 2 Hill, 260; 1 Shar. Bl., 441 and note.

Consideration for agreement of separation.

SEC. 160. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

N. Y. C. C., Sec. 81.

May be joint tenants, etc.

SEC. 161. A husband and wife may hold real or personal property together, jointly or in common, or as community property.

N. Y. C. C., Sec. 82.

Separate property of the wife.

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, be-

quest, devise or descent, with the rents, issues and profits thereof, is her separate property. •

Const., Art. XI, Sec. 14; "Husband and Wife," Sec. 1; Snyder vs. Webb, 3 Cal., 83; Bessie vs. Earle, 4 Cal., 200; Tryon vs. Sutton, 14 Cal., 490; Dow vs. G. & C. S. M. Co., 31 Cal., 629; George vs. Ransom, 13 Cal., 322; Racouillat vs. Sansevain, 32 Cal., 376; Hart vs. Robertson, 21 Cal., 346; Ramsdell vs. Fuller, 28 Cal., 37; Lewis & Chand vs. Johns, 24 Cal., 98; 26 Cal., 546; 31 Cal., 420; 11 Cal., 71; 30 Cal., 511; 25 Cal., 367; 20 Cal., 175; 12 Cal., 564; 14 Cal., 576; 21 Cal., 47; 31 Cal., 440; 15 Cal., 483.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.

Separate  
property of  
the husband.

"Husband and Wife," Sec. 1; 12 Cal., 216; 26 Cal., 546; 31 Cal., 420.

SEC. 164. All other property acquired after marriage, by either husband or wife, is community property.

Common  
property.

"Husband and Wife," Sec. 2; 8 Cal., 507; 11 Cal., 201; 12 Cal., 216; 12 Cal., 247; 12 Cal., 114; 15 Cal., 127; 21 Cal., 87; 22 Cal., 283; 23 Cal., 70; 23 Cal., 393; 26 Cal., 546; 31 Cal., 440.

SEC. 171. A full and complete inventory of the separate personal property of the wife must be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the Recorder of the county in which the parties reside.

Inventory  
of separate  
property of  
wife.

"Husband and Wife," Secs. 3, 4; 22 Cal., 283.

SEC. 172. The filing of the inventory in the Recorder's office is notice of the title of the wife.

Filing inven-  
tory, notice  
of wife's  
title.

"Husband and Wife," Sec. 5.

SEC. 173. The failure to file such inventory, or the non-entry of her personal property therein, is prima facie evidence, as between the wife and purchasers from the husband in good faith and for a valuable consideration, that such property is not the separate property of the wife.

Non-entry  
of property  
therein  
prima facie  
evidence  
that it is not  
common  
property.

[New section.]

Earnings of wife not liable for debts of husband.

SEC. 174. The earnings of the wife are not liable for the debts of the husband.

Stats. 1870, 226.

Earnings of wife, when living separate, separate property.

SEC. 175. The earnings and accumulations of the wife, and of her minor children living with her, or in her custody, while she is living separate from her husband, are the separate property of the wife.

Stats. 1870, 226.

Liability for debts of wife contracted before marriage.

SEC. 176. The separate property of the husband is not liable for the debts of the wife, contracted before the marriage.

"Husband and Wife," Sec. 5, 13; Van Maren vs. Johnson, 13 Cal., 308; 16 Cal., 69.

Wife's property not liable for debts of the husband, but liable for her own debts.

SEC. 177. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage.

[New section.] Based on "Husband and Wife," Secs. 5, 13.

Power of the husband over common property.

SEC. 178. The husband has the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate.

"Husband and Wife," Sec. 9; 5 Cal., 252; 12 Cal., 216; 15 Cal., 308.

NOTE.—The following section had a place in first draft. It is retained in the form of a note. The Legislature can restore if desirable :

"SEC. —. In cases of fraudulent transfers, gross mismanagement or profligate waste of common property by the husband, the wife may have her action in the proper Court, and is, upon proper showing, entitled to a judgment—

1. Securing to her the entire management and absolute power of disposition of it, in like manner and extent as the husband had before the commencement of the action; or,

2. Appointing a Trustee to manage it, as the Court may direct; or,

3. Equitably dividing the property, making the part awarded to each their separate property."

This is a new section, and may seem at first like an alarming innovation. There is a strange inconsistency in the existing law :

1. The property is made common between the husband and wife. They have a common interest in it.

2. The husband can sell it, give it away or wilfully destroy it—exercise all the powers of absolute, exclusive ownership, and the wife has no remedy except by *divorce* or *his death*. She must witness the passing away, through profligacy, of a family competence in which she has half interest—a right without a remedy. This section is intended to secure the remedy in grievous cases only.

Sec. 179. No estate is allowed the husband as tenant by courtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

Courtesy and dower not allowed.

"Husband and Wife," Sec. 10.

Sec. 180. Neither husband nor wife, as such, is answerable for the acts of the other.

Neither answerable for the acts of the other.

N. Y. C. C., Sec. 83.

Sec. 181. If the husband neglects to make adequate provision for the support of his wife, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

Support of wife.

N. Y. C. C., Sec. 84.

Sec. 182. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him.

Husband not liable when abandoned by wife.

N. Y. C. C., Sec. 85.

Sec. 183. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement, containing stipulations contrary thereto.

Rights of husband and wife governed by what.

"Husband and Wife," Sec. 14.

Sec. 184. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

Marriage settlement contracts, how executed.

"Husband and Wife," Sec. 16.

Sec. 185. When such contract is acknowledged or proved, it must be recorded in the office of the Recorder of every county in which any real estate may be situated which is granted or affected by such contract.

To be acknowledged and recorded.

"Husband and Wife," Sec. 17.

Sec. 186. The recording or non-recording of such contract has a like effect as the recording or non-recording of instruments affecting real property, as provided in the chapter on *Recording Transfers*.

Effect of recording.

[New section.] Based on "Husband and Wife," Sec. 18.

Minors may  
make mar-  
riage settle-  
ments.

**SEC. 187.** A minor capable of contracting marriage may make a valid marriage settlement.

“Husband and Wife,” Sec. 20.

Rights of  
married  
woman as  
sole trader.

**SEC. 188.** When the wife is a sole trader, under the provisions of the CODE OF CIVIL PROCEDURE, she has the legal capacity and rights of an unmarried woman, concerning her business and property, subject to the limitations contained in that Code.

[New section.]

## TITLE II.

### PARENT AND CHILD

#### CHAPTER I. BY BIRTH.

#### II. BY ADOPTION.

### CHAPTER I.

#### CHILDREN BY BIRTH.

**SECTION 193.** Legitimacy of children born in wedlock.

194. Legitimacy of children born out of wedlock.

195. Who may dispute the legitimacy of a child.

196. Obligation of parents for the support and education of their children.

197. Custody of legitimate child.

198. Husband and wife living separate, neither to have superior right to custody of children.

199. When husband or wife may bring action for the exclusive control of children. Decree in such cases.

200. Custody of an illegitimate child.

201. Allowance to parent.

202. Parent cannot control the property of child.

203. Remedy for parental abuse.

204. When parental authority ceases.

205. Remedy when a parent dies without providing for the support of his child.

206. Reciprocal duties of parents and children in maintaining each other.

207. When a parent is liable for necessities supplied to a child.

208. When a parent is not liable for support furnished his child.

209. Husband not bound for the support of his wife's children by a former marriage.



**SECTION 210.** Compensation and support of adult child.

211. Parent may relinquish services and custody of child.

212. Wages of minors.

213. Right of parent to determine the residence of child.

214. Parent not liable for acts of child.

215. Wife in certain cases may obtain custody of minor children.

**SEC. 193.** All children born in wedlock are presumed to be legitimate.

Legitimacy  
of children  
born in wed-  
lock.

N. Y. C. C., Sec. 86.

**SEC. 194.** All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate. But if during such period she marries again, and afterwards has a child, it is presumed to be her legitimate offspring by the second husband.

Legitimacy  
of children  
born out of  
wedlock.

N. Y. C. C., Sec. 87.

**SEC. 195.** The presumption of legitimacy can be disputed only by the husband or wife, or the heir or devisee of one or both of them, or the successors of the decedent. Illegitimacy, in such case, may be proved like any other fact.

Who may  
dispute the  
legitimacy  
of a child.

N. Y. C. C., Sec. 88.

**SEC. 196.** The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

Obligation of  
parents for  
the support  
and educa-  
tion of their  
children.

N. Y. C. C., Sec. 89.

**SEC. 197.** The father of a legitimate unmarried minor is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, if she is living and capable of consent. If the father is dead, or is unable, or refuses to take the same, or has abandoned his family, the mother is entitled thereto.

Custody of  
legitimate  
child.

N. Y. C. C., Sec. 90.

**SEC. 198.** The husband and father, as such, shall have no rights superior to those of the wife and mother, in regard to the care, custody, education and control of the children of the marriage, while such husband and wife live separate and apart from each other.

Husband  
and wife liv-  
ing separate,  
neither to  
have supe-  
rior right to  
custody of  
children.

When husband or wife may bring action for the exclusive control of children. Decree in such cases.

SEC. 199. Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage; and the Court may, during the pending of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage, as may be just and in accordance with the natural rights of the parents and the best interests of the children, and may at any time thereafter amend, vary or modify such order or decree, as the natural rights and the interests of the parties, including the children, may require.

Custody of an illegitimate child.

SEC. 200. The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings.

N. Y. C. C., Sec. 91.

Allowance to parent.

SEC. 201. The proper Court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

N. Y. C. C., Sec. 92.

Parent cannot control the property of child.

SEC. 202. The parent, as such, has no control over the property of the child.

N. Y. C. C., Sec. 93.

Remedy for parental abuse.

SEC. 203. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the Supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, the parent punished, and the duty of support and education enforced.

N. Y. C. C., Sec. 94.

When parental authority ceases.

SEC. 204. The authority of a parent ceases—

1. Upon the appointment by a Court of a guardian of the person of a child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority.

N. Y. C. C., Sec. 95.

Remedy when a parent dies without providing for the support of his child.

SEC. 205. If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leav-

ing an estate sufficient for its support, the Supervisors of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees and next of kin of the parent.

N. Y. C. C., Sec. 96.

Sec. 206. It is the duty of the father, the mother and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding.

Reciprocal duties of parents and children in maintaining each other.

N. Y. C. C., Sec. 97.

Sec. 207. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent.

When a parent is liable for necessities supplied to a child.

N. Y. C. C., Sec. 98.

Sec. 208. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

When a parent is not liable for support furnished his child.

N. Y. C. C., Sec. 99.

Sec. 209. A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services.

Husband not bound for the support of his wife's children by a former marriage.

N. Y. C. C., Sec. 100.

Sec. 210. Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

Compensation and support of adult child.

N. Y. C. C., Sec. 101.

Sec. 211. The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him

Parent may relinquish services and custody of child.

and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

N. Y. C. C., Sec. 102.

Wages of  
minors.

SEC. 212. The wages of a minor employed in service may be paid to him, unless, within thirty days after the commencement of the service, the parent or guardian entitled thereto gives the employer notice that he claims such wages.

N. Y. C. C., Sec. 103.

Right of  
parent to  
determine  
the residence  
of child.

SEC. 213. A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child.

N. Y. C. C., Sec. 104.

Parent not  
liable for  
acts of child.

SEC. 214. Neither parent nor child is answerable, as such, for the acts of the other.

N. Y. C. C., Sec. 105.

Wife in cer-  
tain cases  
may obtain  
custody of  
minor chil-  
dren.

SEC. 215. When a husband and wife live in a state of separation, without being divorced, any Court or officer of competent jurisdiction, upon application of the wife, if she is an inhabitant of this State, may grant the proper writ to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of the child to either party for such time, and under such regulations, as the case may require. The decision of the tribunal is to be guided by the rules prescribed in Sec. 246.

N. Y. C. C., Sec. 106.

## CHAPTER II.

### ADOPTION.

SECTION 221. Child may be adopted.

222. Who may adopt.

223. Consent of wife necessary.

224. Consent of child's parents.

225. Consent of child.

226. Proceedings on adoption.

227. Judge's order.

228. Effect of adoption.

229. Effect on former relations of child.

230. Adoption of illegitimate child.

**SEC. 221.** Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter.

Child may  
be adopted.

The total absence of any provision for the adoption of children is one of the most remarkable defects of our law. Thousands of children are actually, though not legally, adopted every year; yet there is no method by which the adopting parents can secure the children to themselves, except by a fictitious apprenticeship, a form which, when applied to children in the cradle, becomes absurd and repulsive. It is, indeed, so inappropriate in every case that it is rarely resorted to. The consequence is, almost invariably, that if the real parents of the child live to see it grow to an age of usefulness and intelligence they are certain to attempt to reclaim it, sometimes through the mere selfishness of natural affection, but more commonly from base and sordid motives. The chances of an adopting parent for the retention of the child upon which, perhaps, his whole heart is centred, are therefore in the inverse ratio to the degree of his benevolence in its selection, and of his care and affection in its training. Benevolence dictates a choice from among children whose parents are least able or willing to take care of them. To relieve a child from a cruel and heartless parent is a greater mercy than to take even an orphan. Yet these are the parents who are, of all others, most likely to reclaim the child as soon as any money can be made out of it. Affection will give the child such a training as will develop its beauty and intelligence to the highest degree. Yet every grace of the child is but a premium upon the extortion of its heartless parents. This is not mere theory. Facts within the knowledge of almost every one justify these statements. There are very many childless parents who would gladly adopt children, but for their well-founded fears that they could never hold them securely.

N. Y. C. C., Sec. 107; Stats. 1870, 530, Sec. 1.

**SEC. 222.** The person adopting a child must be at least fifteen years older than the person adopted, and must have been married, and if a woman, must be a widow, or be lawfully divorced from her husband, without her fault.

Who may  
adopt.

N. Y. C. C., Sec. 108; Stats. 1870, 530, Sec. 1.

**SEC. 223.** A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife.

Consent of  
wife neces-  
sary.

N. Y. C. C., Sec. 109; Stats. 1870, 530, Sec. 2.

**SEC. 224.** A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be a habitual drunkard, or who has been

Consent of  
child's par-  
ents.

judicially deprived of the custody of the child, on account of cruelty or neglect.

N. Y. C. C., Sec. 110 ; Stats. 1870, 530, Sec. 3.

Consent of  
child.

SEC. 225. The consent of a child, if over the age of twelve years, is necessary to its adoption.

N. Y. C. C., Sec. 111 ; Stats. 1870, 530, Sec. 3.

Proceedings  
on adoption.

SEC. 226. The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the County Judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated.

N. Y. C. C., Sec. 112 ; Stats. 1870, 530, Sec. 4.

Judge's  
order.

SEC. 227. The Judge must examine all persons appearing before him pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

N. Y. C. C., Sec. 113 ; Stats. 1870, 530, Sec. 5.

Effect of  
adoption.

SEC. 228. A child, when adopted, takes the name of the person adopting, and the two thenceforth sustain towards each other the legal relation of parent and child, and have all the right and are subject to all the duties of that relation.

N. Y. C. C., Sec. 114 ; Stats. 1870, 530, Sec. 6.

Effect on  
former rela-  
tions of child

SEC. 229. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

N. Y. C. C., Sec. 115 ; Stats. 1870, 530, Sec. 7.

Adoption of  
illegitimate  
child.

SEC. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such ; and such child is thereupon deemed for all purposes legitimate from the time

of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

This provision, like the rest, is new, but is so manifestly just, and the present state of the law is so unmerciful to innocent children, that it is presumed that no objection will be made to the change. The seducer can make reparation to the mother of his child, though she is more or less culpable, but can at present make absolutely none to the child, though perfectly innocent. By the law of France, and of almost every European nation, and in this country, by the law of Maine, Vermont, Massachusetts, Connecticut, Ohio, Illinois, Indiana, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky and Missouri, a child is legitimized by the marriage of its parents after its birth. Privacy is an indispensable element of such an adoption. To compel the father to appear before a Judge, or in any way to place the matter upon record, would brand the child with the very stigma from which a repentant father would desire to save it.

N. Y. C. C., Sec. 116; Stats. 1870, 530, Sec. 9.

NOTE.—Our Statute of 1870 was simply adopting this chapter of the New York Civil Code in advance.

## TITLE III.

### GUARDIAN AND WARD.

NOTE.—Under this head are placed not only the provisions of law relating to the guardianship of minors, but also those relating to the custody and care of persons of unsound mind. The "committee" of a lunatic is here termed a "guardian."

#### SECTION 236. Guardian, what.

237. Ward, what.

238. Kinds of guardians.

239. General guardian, what.

240. Special guardian, what.

241. Appointment by parent.

242. No person guardian of estate without appointment.

243. Appointment by Court.

244. Same.

245. Jurisdiction.

246. Rules for awarding custody of minor.

247. Powers of guardian appointed by Court.

248. Duties of guardian of the person.

249. Duties of guardian of estate.

250. Relation confidential.

251. Guardian under direction of Court.

252. Death of a joint guardian.

**SECTION 253. Removal of guardian.**

254. Guardian appointed by parent, how superseded.

255. Guardian appointed by Court, how superseded.

256. Release by ward.

257. Guardian's discharge.

258. Insane persons.

Guardian,  
what.

**SEC. 236.** A guardian is a person appointed to take care of the person or property of another.

N. Y. C. C., Sec. 117.

Ward, what.

**SEC. 237.** The person over whom or over whose property a guardian is appointed is called his ward.

N. Y. C. C., Sec. 118.

Kinds of  
guardians.

**SEC. 238.** Guardians are either—

1. General; or,

2. Special.

N. Y. C. C., Sec. 119.

General  
guardian,  
what.

**SEC. 239.** A general guardian is a guardian of the person, or of all the property of the ward within this State, or of both.

N. Y. C. C., Sec. 120.

Special  
guardian,  
what.

**SEC. 240.** Every other is a special guardian.

N. Y. C. C., Sec. 121.

Appoint-  
ment by  
parent.

**SEC. 241.** A guardian of the person of a child born, or likely to be born, may be appointed, by will or by deed, to take effect upon the death of the parent appointing—

1. If the child is legitimate, by the father, with the written consent of the mother; or by either parent, if the other is dead or incapable of consent.

2. If the child is illegitimate, by the mother.

N. Y. C. C., Sec. 122.

No person  
guardian  
of estate  
without ap-  
pointment.

**SEC. 242.** No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as hereinafter provided.

N. Y. C. C., Sec. 123.

Appoint-  
ment by  
Court.

**SEC. 243.** A guardian of the person or property, or both, of a person residing in this State, who is a minor, or of unsound mind, may be appointed in all cases by the Probate Court, as provided in the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 124.



**SEC. 244.** A guardian of the property within this State of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the Probate Court. Same.

N. Y. C. C., Sec. 125.

**SEC. 245.** In all cases, the Court first making the appointment of a guardian has exclusive jurisdiction to appoint and control him, except in case of a removal pursuant to Sec. 253. Jurisdiction.

N. Y. C. C., Sec. 126.

**SEC. 246.** In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations: Rules for awarding custody of minor.

1. By what appears to be for the best interest of the child, in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father.

3. Of two persons equally eligible in other respects, preference is to be given as follows:

*First*—To a relative.

*Second*—To one who was indicated by the wishes of a deceased parent.

*Third*—To one who already stands in the position of a Trustee of a fund to be applied to the child's support.

N. Y. C. C., Sec. 127.

**SEC. 247.** A guardian appointed by a Court has power over the person and property of the ward, unless otherwise ordered. Powers of guardian appointed by Court.

N. Y. C. C., Sec. 128.

**SEC. 248.** A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the Duties of guardian of the person.

ward at any place within the State, but not elsewhere, without permission of the Court.

N. Y. C. C., Sec. 129.

Duties of  
guardian of  
estate.

SEC. 249. A guardian of the property must keep safely the property of his ward. He must not suffer any sale, waste or destruction of the real property, but must maintain the inheritance, its buildings and appurtenances, out of the moneys of the estate, and deliver the same to the ward at the close of his guardianship, in as good condition as he received them, inevitable decay and injury only excepted.

N. Y. C. C., Sec. 130.

Relation  
confidential.

SEC. 250. The relation of guardian and ward is confidential, and is subject to the provisions of the Title on *Trust*.

N. Y. C. C., Sec. 131.

Guardian  
under direc-  
tion of Court

SEC. 251. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the Court.

N. Y. C. C., Sec. 132.

Death of a  
joint guar-  
dian.

SEC. 252. On the death of one of two or more joint guardians, the power continues to the survivor, until a further appointment is made by the Court.

N. Y. C. C., Sec. 133.

Removal of  
guardian.

SEC. 253. A guardian may be removed by the Probate Court for any of the following causes:

1. For abuse of his trust.
2. For continued failure to perform its duties.
3. For incapacity to perform its duties.
4. For gross immorality.
5. For having an interest adverse to the faithful performance of his duties.
6. For removal from the State.
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.

N. Y. C. C., Sec. 134.

Guardian  
appointed by  
parent, how  
superseded.

SEC. 254. The power of a guardian appointed by a parent is superseded—

## CIVIL CODE.

1. By his removal, as provided by Sec. 253.
2. By solemnized marriage of the ward ; or,
3. By the ward's attaining majority.

N. Y. C. C., Sec. 135. Subd. 2 changed to conform to Sec. —.

Sec. 255. The power of a guardian appointed by a Court is superseded only—

Guardian appointed by Court, how superseded.

1. By the order of the Court ; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority.

N. Y. C. C., Sec. 136.

Sec 256. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.

Release by ward.

N. Y. C. C., Sec. 137.

Sec. 257. A guardian appointed by a Court is not entitled to his discharge until one year after the ward's majority.

Guardian's discharge.

N. Y. C. C., Sec. 138.

Sec. 258. A person of unsound mind may be placed in an asylum for such persons, upon the order of the County Judge of the county in which he resides, as follows :

Insane persons.

1. The Judge must be satisfied, by the oath of two reputable physicians, that such person is of unsound mind, and unfit to be at large.

2. Before granting the order, the Judge must examine the person himself, or if that is impracticable, cause him to be examined by an impartial person.

3. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy.

N. Y. C. C., Sec. 139.

NOTE.—This Title (Guardian and Ward) is inserted here as being concise and giving harmony to the Civil Code. Some of its provisions are also in "Proceedings of Probate Courts," Tit. XI, Code of Civil Procedure, which had already been prepared. They will be expunged from the one or the other before presentation to the Legislature.

## TITLE IV.

## MASTER AND SERVANT.

**SECTION 264.** Minors may apprentice themselves.

265. Consent of parents, etc., requisite.

266. Written consent.

267. Executors may bind.

268. Supervisors may bind out.

269. Town officers.

270. Age of apprentice to be inserted in indentures.

271. Indentures, conditions in.

272. Same.

273. Deposit of indentures.

274. Alien minors.

275. Contract under preceding section to be acknowledged.

276. Causes for annulling indentures.

277. Proceedings to annul indentures.

278. Service of apprentice, how enforced.

Minors may  
apprentice  
themselves.

**SEC. 264.** Every minor, with the consent of the persons or officers hereinafter mentioned, may, of his own free will, bind himself, in writing, to serve as clerk, apprentice or servant, in any profession, trade or employment, during his minority; and such binding shall be as valid and effectual as if such minor was of full age at the time of making the engagement.

Stats. 1858, 134, Sec. 1.

Consent of  
parents, etc.,  
requisite.

**SEC. 265.** Such consent shall be given—

1. By the father of the minor. If he be dead or be not of legal capacity to give his consent, or if he shall have abandoned or neglected to provide for his family, and such fact be certified by a Justice of the Peace of the township or county, or sworn to by a credible witness, and such certificate or affidavit be indorsed on the indenture, then—

2. By the mother. If the mother be dead, or be not of legal capacity to give such consent or refusal, then—

3. By the guardian of such infant. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then—

4. By the Supervisors of the county, or any two Justices of the Peace, or the Judge of the Probate Court of the county.

5. If such minor be an orphan, under the care and con-

trol of any orphan asylum in this State, then by the Board of Managers thereof.

Stats. 1858, 134, Sec. 2.

SEC. 266. Such consent shall be signified in writing by the person entitled to give the same, by certificate at the end of or indorsed upon the indentures. Written consent.

Stats. 1858, 134, Sec. 3.

SEC. 267. The executors of any last will of a parent, who shall be directed in such will to bring up his or her child to some trade or calling, may bind such child to service as a clerk or apprentice, in like manner as the father might have done if living. If there is a surviving mother, her consent also is necessary. Executors may bind.

Stats. 1858, 134, Sec. 4.

NOTE.—The last clause, providing for the consent of the mother, is new.

SEC. 268. The Supervisors of the county may bind out minors who are or shall become chargeable to such county, to be clerks, apprentices or servants, which binding shall be as effectual as if such minors had bound themselves with the consent of their father. Supervisors may bind out

Stats. 1858, 134, Sec. 5.

SEC. 269. In every town or city, the presiding officer of the first council or legislative board thereof, if there be more than one, or any public officer or officers appointed to provide for the poor, may in like manner bind out any child who, or whose parents are, chargeable to any such town or city. Town officers

Stats. 1858, 134, Sec. 6.

SEC. 270. The age of every infant so bound shall be inserted in the indentures, and shall be taken to be the true age; and whenever public officers are authorized to execute any indentures, or their consent is required to the validity of the same, it shall be their duty to inform themselves fully of the infant's age. Age of apprentice to be inserted in indentures.

Stats. 1858, 134, Sec. 7.

SEC. 271. Every sum of money paid or agreed for, with, or in relation to, the binding out of any clerk, apprentice or servant, shall be inserted in the indentures. Indentures, conditions in

Stats. 1858, 134, Sec. 8.

Same.

**SEC. 272.** The indenture shall also contain an agreement on the part of the person to whom such child shall be bound, that he will cause such child to be instructed to read and write, and to be taught the general rules of arithmetic, or, in lieu thereof, that he will send such child to school three months of each year of the period of indenture.

Stats. 1858, 134, Sec. 9.

Deposit of  
indentures.

**SEC. 273.** The counterpart of any indenture executed by any county, or city or town officers, shall be by them deposited in the offices, respectively, of the Clerk of any such county, city or town.

Stats. 1858, 134, Sec. 10.

Alien minors

**SEC. 274.** Any minor, capable of becoming a citizen of this State, coming from any other country, State or Territory, may bind himself to service until his majority, or for any shorter term. Such contract, if made for the purpose of raising money to pay his passage, or for the payment of such passage, may be for the term of one year, although such term may extend beyond the time when such person will be of full age, but it shall in no case be for a longer term.

Stats. 1858, 134, Sec. 11.

Contract,  
under pre-  
ceding sec-  
tion to be ac-  
knowledged.

**SEC. 275.** No contract made under the preceding section shall bind the servant, unless duly acknowledged by the person making such contract, before some public magistrate or other officer authorized to administer oaths, and such acknowledgment, certifying that the same was made freely on private examination, be indorsed upon the contract.

Stats. 1858, 134, Sec. 12.

Causes for  
annulling  
indentures.

**SEC. 276.** Such indentures of apprenticeship may be annulled for—

1. Fraud in the contract of indenture.
2. When such contract is not made or executed in accordance with the provisions of this Title.
3. For wilful non-fulfilment, by such master, of the provisions of such indenture.
4. Cruelty or maltreatment of such apprentice by the

**master, without just cause or provocation. In such case, the apprentice may recover for his services.**

Stats. 1858, 134, Sec. 14.

**SEC. 277. For the purpose of annulling such contract of apprenticeship and recovering for services, the apprentice shall have his action in the proper Court, and shall be governed therein by the CODE OF CIVIL PROCEDURE.**

Proceedings  
to annul  
indentures.

[New section.] Stats. 1858, 134, Sec. 15.

NOTE.—The whole section providing a system of special proceedings, is struck out and the above section substituted.

**SEC. 278. Any person held to service under the provisions of this Title, and unlawfully departing and absenting himself therefrom, upon the application of the master of such person to the proper Court, shall be subject to the proceedings and orders provided in such cases in the CODE OF CIVIL PROCEDURE.**

Service of  
apprentice,  
how enforc'd

NOTE.—A section must be provided in the Code of Civil Procedure.

This Title (Master and Servant), is a literal copy of the Statutes of 1858, save the last two sections, which provided for special remedies.





# PART IV.

## CORPORATIONS.

### **TITLE I. GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.**

- II. INSURANCE CORPORATIONS.
- III. RAILROAD CORPORATIONS.
- IV. STREET RAILROAD CORPORATIONS.
- V. WAGON ROAD CORPORATIONS.
- VI. BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.
- VII. TELEGRAPH CORPORATIONS.
- VIII. WATER AND CANAL CORPORATIONS.
- IX. HOMESTEAD CORPORATIONS.
- X. SAVINGS AND LOAN CORPORATIONS.
- XI. MINING CORPORATIONS.
- XII. RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.
- XIII. CEMETERY CORPORATIONS.
- XIV. AGRICULTURAL FAIR CORPORATIONS.
- XV. GAS CORPORATIONS.
- XVI. LAND AND BUILDING CORPORATIONS.

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## TITLE I.

### GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.

#### CHAPTER I. FORMATION OF CORPORATIONS.

- II. CORPORATE STOCK.
- III. CORPORATE POWERS.
- IV. EXTENSION AND DISSOLUTION OF CORPORATIONS.

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## CHAPTER I.

### FORMATION OF CORPORATIONS.

#### ARTICLE I. CORPORATIONS DEFINED AND HOW ORGANIZED.

- II. BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

## ARTICLE I.

## CORPORATIONS DEFINED AND HOW ORGANIZED.

## SECTION 283. Corporation defined.

- 284. What are public and private corporations.
- 285. Corporations, how formed.
- 286. For what purpose private corporations are formed.
- 287. How corporations may continue their existence under this Code.
- 288. Must commence to perpetuate, when.
- 289. Name of instrument creating corporation.
- 290. Articles of incorporation, what to contain.
- 291. Certain corporations to state further facts in articles.
- 292. Pre-requisite to filing articles. Amounts to be subscribed to be fixed.
- 293. Pre-requisite to filing articles of corporations for profit.
- 294. Oath of officer to subscription of stock and payment of ten per cent.
- 295. Five corporators, three to be citizens of the State, to sign articles and acknowledge the same.
- 296. To submit articles of insurance corporations to Insurance Commissioner.
- 297. To file articles with County Clerk and Secretary of State, and receive certificate. Term of existence.
- 298. Certified copy of certificate to be prima facie evidence of its contents.

Corporation defined.

SEC. 283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

N. Y. C. C., vol. 2, p. 117.

What are public and private corporations.

SEC. 284. Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; private corporations are formed for the purpose of religion, benevolence, education, art, literature or profit.

Const., Art. IV., Sec. 31; A. and A. on Corporations, Secs. 12, 32; N. Y. C. C., vol. 2, p. 117.

NOTE.—As much controversy has arisen, not only in our State, but throughout many of the States of the Union, on the subject of this section, we have deemed it best to give these definitions, which, in our opinion, are but a reiteration of our very explicit Constitution, and in accordance with excellent authority.

Corporations, how formed.

SEC. 285. Private corporations may be formed by the voluntary association of any five or more persons, for the

purposes and in the manner prescribed in this article. A majority of such persons shall be citizens of this State. Married women may become corporators, officers and members, of religious, benevolent, art, literary or educational corporations.

Stats. 1858, 264, Sec. 2; N. Y. C. C., vol 2, p. 118.

**NOTE.**—This section is new, and is intended as a substitute for the first section of almost every Act authorizing the formation of corporations for particular purposes, of which there are many in our statutes. Their great proximity, and their diversity in the number of corporators and other respects, is intended by the Commission to be obviated by condensing provisions and sections having similar objects into one, as is done here.

In the New York Code the minimum is three, but as the majority of our corporation Acts name a larger number as their minimum—some as many as thirteen—the Commission, for obvious reasons, felt unwilling to place the number less than five. The following Acts show the numbers adopted (late legislation has increased rather than diminished the number): Stats. 1850, 347; 1851, 523; 1861, 607; 1853, 87; 1857, 75; 1859, 281; 1862, 199; 1866, 743; 1866, 752; 1853, 169; 1858, 57; 1861, 567; 1863, 624.

**SEC. 286.** The purposes for which private corporations may be formed are the following, and none other :

For what  
purpose  
private cor-  
porations  
are formed.

1. Fire and marine, life or health and accident insurance.

2. The insurance of the lives of domestic animals.

3. Construction, conduct and maintenance of railroads, and telegraph lines in connection therewith.

4. Construction, conduct and maintenance of street railroads, plank roads, turnpikes or common wagon roads.

5. Construction, conduct and maintenance of bridges, ferries, wharves, chutes or piers.

6. The establishment, conduct and maintenance of express or stage lines.

7. Constructing, conducting and maintaining telegraph lines.

8. Constructing and maintaining canals for navigation, drainage, agricultural or mining purposes.

9. For navigating the ocean or any of the waters of this State with vessels propelled by sails, or in whole or in part by steam.

10. The purchase of lands for, and the distribution of homesteads.

For what  
purpose  
private cor-  
porations  
are formed.

11. The accumulation of funds for the purchase of real property, and for the erection of buildings and improvements thereon, for the benefit of the members thereof.

12. Accumulating savings, and loaning the funds of the members thereof.

13. Manufacturing, mining, mercantile, commercial, mechanical, wharfing and docking, or chemical purposes.

14. The transacting of a printing and publishing business.

15. To supply water to the public.

16. The manufacture and supply of gas, or the supply of light or heat to the public by any other means

17. The establishment, conduct and maintenance of hotels, laundries or theatres.

18. For the formation, conduct and maintenance of District and County Agricultural Fairs.

19. The encouragement of, or business of, agriculture, horticulture or stock raising.

20. The improvement of the breed of domestic animals.

21. The support, conduct and maintenance of colleges of learning or any literary or scientific object, or for the promotion of any of the sciences or fine arts.

22. Acquiring, preserving and conducting public libraries.

23. The organization and conduct of Chambers of Commerce, Boards of Trade and Mechanic Institutes.

24. The support, conduct and maintenance of homes and schools for orphans and foundlings, or either of them, or those otherwise destitute.

25. For the purposes of religion, sociability, benevolence or learning.

26. The purchase of lands for, and the maintenance of, cemeteries.

[New section.]

Stats. 1865-6, 743, 752; 1861, 607; 1853, 114, 160; 1862, 540; 1850, 347; 1867-8, 539; 1862, 199; 1867-8, 459; 1870, 130-2, 364; 1870, 523; 1853, 574; 1857, 121; 1862, 41; 1863-4, 76; 1870, 822; 1852, 171; 1870, 660; 1870, 815; 1859, 104; 1867-8, 204, 218; 1870, 419; 1863, 624; 1865-6, 469; 1857, 75; 1850, 347; 1870, 402, 702; 1859, 281.

NOTE.—It will be observed that in the classification of the purposes for which corporations may be organized, one very extensive class has been omitted. We allude to the seventh class, under the Act of April 14th, 1853, p. 87, which reads thus: "Or for the purpose of engaging in any

other *species* of trade or commerce, foreign or domestic." This was "amended," March 5th, 1864 (Stats. 1863-4, 149), by inserting the word "business" after the word "trade." We are of the opinion that this was an *advance backwards*; and subsequent legislation on the same subject—even that had at the session of 1870 (Stats. 1870, 822)—shows that a similar "advance," to a greater extent, has been made. It is not our purpose, in this note, to discuss the propriety of "specifying" particularly the objects for which corporations may be formed; but if the Act of 1853, as amended in 1863-4, and that of 1870, are to be retained, all others should be stricken from the Code, for they comprehend and permit every species of corporation. A sufficient reason for our proposed change may be found in the decision of the Supreme Court at the October Term, 1870—*Vandall vs. South San Francisco Dock Company*—in which the learned Judge (Crockett) uses this very significant language: "Whatever difficulties surround this question result from the peculiar nature of this class of corporations, organized for the *mere* purpose of speculating in real estate; and though it may be a very questionable policy which permits corporations to be formed for such a purpose, that is a consideration to be addressed to the Legislature and not to the Court." For this reason we have omitted this class of corporations, except in so far as they are embraced in the classes enumerated in this section, which are supposed to be sufficiently broad to embrace every character of business requiring a combination of capital for the successful prosecution of the proposed business.

**SEC. 287.** Any existing corporation formed under any law of this State, for any purpose designated in any subdivision of the preceding section, may, at a meeting of its members, stockholders or shareholders, called for that purpose, continue its existence, under Tit. I of this Part, or under the provisions of any subsequent Title particularly applicable thereto, as follows:

How corporations may continue their existence under this Code.

1. Public notice of such meeting must be given by publishing the same, together with its object, in a daily newspaper for two weeks, or a weekly newspaper for four weeks, successively, published in the county where the principal place of business of the corporation is located, or in lieu of the publication personal notice thereof may be given to each member, stockholder or shareholder thereof.

2. Two-thirds of the members, stockholders or shareholders, representing two-thirds of the capital stock or shares, must vote in favor of such continuance.

3. A copy of the proceedings of this meeting, giving

the names of all persons present, the votes taken, the notice calling the meeting, and the proof of publication or service thereof, all duly certified by the President and Secretary of the corporation, must be filed in the offices of the Secretary of State and Clerk of the county where the articles of incorporation are on file. Thereafter such corporation is possessed of all the rights and powers and subject to all the obligations, restrictions and limitations provided in this Part applicable thereto, and its corporate existence is continued.

[New section.]

Must commence to perpetuate, when.

SEC. 288. Unless within ninety days after this Code goes into effect proceedings are commenced to continue its existence under this Code, as provided in the preceding section, and such proceedings are completed and perfected within forty days thereafter, every existing corporation organized under any law of this State is suspended, and its charter of authority is withdrawn.

[New section.]

NOTE.—The object of the two preceding sections is to place all corporations on an equal footing, and under a general system of uniformity. The method of continuation is easy, and certainly unobjectionable.

Name of instrument creating corporation.

SEC. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

[New section.]

Articles of incorporation, what to contain.

SEC. 290. Articles of incorporation must be prepared, setting forth—

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted or where its principal office is located.
4. The term for which it is to exist, not exceeding fifty years.
5. The number of its Directors or Trustees, and the names and residences of those who are appointed for the first year.
6. The amount of its capital stock and the number of shares into which it is divided.
7. The amount of capital stock actually subscribed and by whom.

N. Y. C. C., vol. 2, p. 121; *Harris vs. McGregor*, 29 Cal., 124; *Mok. H. M. Co. vs. Woodbury*, 14 Cal., 424; *S. V. Water Co. vs. San Francisco*, 22 Cal., 434; Stats. 1868, 539, Secs. 2, 3.

**NOTE.**—On examination, it will be observed that the main features of the articles of incorporation provided for under every Corporation Act is embodied in this section. Reference is here made to the same Acts as in the note to Sec. 286.

**SEC. 291.** The articles of incorporation of any railroad, telegraph, canal, water, wagon road, stage line or express organization must also state—

Certain corporations to state further facts in articles.

1. The kind of road, telegraph, canal, water works, stage line or express intended to be constructed.

2. The place from and to which it is intended to be run, and all the intermediate branches.

3. The estimated length of the road, telegraph, canal, water works, stage line or express.

4. That at least ten per cent. of the capital stock subscribed has been paid in to the Treasurer of the intended corporation.

N. Y. C. C., vol. 2, p. 121.

**SEC. 292.** Each intended corporation named in the preceding section, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit:

Pre-requisite to filing articles.

1. One thousand dollars per mile of railroads.

2. One hundred dollars per mile of telegraph lines.

3. Three hundred dollars per mile of canals, water works or wagon roads.

Amounts to be subscribed to be fixed.

Stats. 1853, 114, 169; 1861, 607.

**NOTE.**—It is intended by the Commission, as far as practicable, to make this pre-requisite uniform on all corporations for profit, as will be observed from this and the following section. At present, some have the provision, others do not.

**SEC. 293.** Before articles of incorporation of any corporation for profit, except those mentioned in the preceding section and those specially excepted in this Part, are filed, there must be, by bona fide subscribers, at least one-fifth portion of the whole proposed capital stock actually

Pre-requisite to filing articles of corporations for profit.

subscribed, and ten per cent. thereof paid into the treasury of the corporation.

Stats. 1850, 370, Secs. 156, 157.

NOTE.—Of course this means ten per cent. of the one-fifth.

Oath of officer to subscription of stock and payment of 10 per cent.

SEC. 294. Before the Secretary of State issues to any corporation organized for profit, a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the President, Secretary or Treasurer named in the articles, that the required amount of the capital stock thereof, if the corporation has a capital stock, has been actually subscribed and ten per cent. thereof actually paid into the treasury of such proposed corporation.

*Dannebroke Mining Company vs. Allment*, 26 Cal., 286 ;  
*Mokulumne Hill Mining Company vs. Woodbury*, 14 Cal., 424.

NOTE.—This provision, existing in many of our laws, is made applicable to all not purely religious or benevolent, or to promote education, art or literature.

Five corporators, three to be citizens of the State, to sign articles and acknowledge the same.

SEC. 295. The articles of incorporation must be subscribed by five or more persons, three of whom must be citizens of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of deeds.

N. Y. C. C., vol. 2, p. 121.

NOTE.—This provision is in all our corporation laws. See also, note to Sec. 286.

To submit articles of insurance corporations to Insurance Commissioner.

SEC. 296. Articles of insurance corporations, before they are filed, must be submitted to the Insurance Commissioner, who must indorse his approval thereon; but he may, as a condition thereof, require the name of the corporation to be changed, if it is, in his judgment, likely to mislead the public.

Stats. 1867-8, 339, Sec. 11.

To file articles with County Clerk and Secretary of State, and receive certificate.

SEC. 297. Upon the filing of the articles of incorporation in the office of the County Clerk of the county in which the business of the company is conducted, or the principal office or object of the corporation is located; or if its business or works extend over two or more counties, then either in the county where its principal office is



located, or in the county first named in alphabetical order; and a copy thereof with the Secretary of State, the Secretary of State must issue to the corporation, over the seal of the State, a certificate that such articles, containing the required statement of facts, have been filed in his office; and thereafter the persons signing the same, and their associates and assigns, are a body politic and corporate, by the name stated in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or in this Part otherwise specially provided.

Term of  
existence.

[New section.]

**SEC. 298.** A copy of any articles of incorporation, filed in pursuance of this chapter, and certified by the County Clerk of the county in which it is filed, or his deputy, or by the Secretary of State, must be received in all the Courts and other places as prima facie evidence of the facts therein stated.

Certified  
copy of cer-  
tificate to be  
prima facie  
evidence of  
its contents.

Stats. 1862, 199, Sec. 3; 1853, 83, Sec. 3; 1850, 370, Sec. 158; 1861, 566, Sec. 17.

## ARTICLE II.

### BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

**SECTION 302.** Adoption of by-laws—when, how, and by whom.

**303.** At first meeting of corporation by-laws to be adopted and Directors elected.

**304.** By-laws to be recorded and how amended.

**305.** By-laws may be made for certain purposes.

**306.** How many and who to be Directors. Vacancies in office of Directors and how filled.

**307.** Election of Directors—how, when, and by whom.

**308.** Organization of Board.

**309.** Officers may be removed, how.

**310.** Justice of the Peace may order meeting.

**311.** Majority of stock must be represented and a majority vote together, otherwise it is fraudulent.

**312.** All stock may be represented in votes.

**313.** Election may be postponed.

**314.** Complaints and quo warrantos, and proceedings thereon regarding elections.

**315.** Dividends to be from surplus profits.

**316.** False certificate, report or notice, to make officers liable.

**317.** Meeting by consent to be valid.

**318.** Proceedings at meeting to be binding.

Adoption of  
by-laws—  
when, how,  
and by whom

SEC. 302. All corporations formed under this Title must provide a code of by-laws for their government, not inconsistent with the Constitution and laws of this State, to be adopted at a meeting of the stockholders or members, within one month after the filing of the articles of incorporation. Notice of such meeting, by order of the acting President, specifying its object, must be published two weeks in some newspaper published in the county where the meeting is to be held, if any is published therein; if none, then in the paper having the largest circulation therein. In the adoption of the by-laws, each stockholder has as many votes as he holds shares of stock; if there is no capital stock, each member has one vote. A majority of all the subscribed capital stock, or of the members, if there is no capital stock, is necessary to adopt the by-laws, or any one of them.

Stats. 1850, 348, Sec. 7; 1862, 540, Sec. 3; 1861, 85,  
Sec. 4.

At first  
meeting of  
corporation  
by-laws to  
be adopted  
and Direc-  
tors elected.

SEC. 303. At the first meeting called, as soon as the by-laws are adopted, unless it is provided that the officers named in the articles of incorporation shall continue until a certain other date, Directors must be elected, a majority of the subscribed capital stock, or of the members, being necessary to a choice.

[New section.]

By-laws to  
be recorded  
and how  
amended.

SEC. 304. All by-laws adopted must be certified by the officers of the corporation, and filed and recorded in the Recorder's office of the county where the principal office of the corporation is located. The by-laws thus adopted must not be altered or amended except at a special meeting of the stockholders or members, to be called by the Directors for that purpose, specifying in the order the proposed amendments, and a two third vote of all the subscribed capital stock, or of the members, is necessary to adopt the same.

[New section.]

By laws may  
be made for  
certain pur-  
poses.

SEC. 305. All corporations may, by their by-laws, where no other provision is specially made, determine—

1. The time, place and manner of calling and conducting their meetings.

2. The number of stockholders or members, or quantity of stock, that shall constitute a quorum.

3. The number of shares that shall entitle the stockholders respectively to one or more votes.

4. The mode of voting by proxy.

5. The mode of selling shares for the non-payment of assessments or instalments.

6. The compensation and duties of officers.

7. The tenure of office of subordinate officers; and,

8. They may prescribe suitable penalties for violations of their by-laws, not exceeding, in any case, one hundred dollars for any one offence.

Stats. 1850, 347, Sec. 7.

SEC. 306. The corporate powers, business and property of all corporations formed under this Title must be exercised, conducted and controlled by a Board of not less than five nor more than eleven Directors, to be elected from among the holders of stock in, or where there is no capital stock, then from the members of, such corporation, a majority of whom must be citizens of this State. Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof. Unless a quorum is present and acting, no business performed or act done is valid as against the corporation. Whenever a vacancy occurs in the office of Director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the Board.

How many  
and who to  
be Directors.

Vacancies  
in office of  
Directors  
and how  
filled.

Stats. 1853, 169, Secs. 5, 7, 8; 1865-6, 743; 1865-6, 752;  
1850, 347, Secs. 159, 345, 347; 1850, 178, Sec. 6;  
1862, 199, Sec. 6; 1863, 624, Sec. 1.

SEC. 307. All corporations must provide in their by-laws for the election of Directors annually, and for notice of the election to be given to the stockholders or members thereof by publication, personal notice or otherwise. Corporations for profit must also publish notice of such election in some newspaper published in the county where the principal office of the corporation is located; if none, then in that paper having the largest circulation therein. A majority of the subscribed capital stock, or

Election of  
Directors—  
how, when,  
and by whom

of the members, is necessary to a choice. All elections must be by ballot.

Stats. 1853, 159 ; 1861, 607 ; 1850, 347, 281 ; 1870, 577,  
Sec. 1.

Organization  
of Board.

SEC. 308. Immediately after their election, the Directors must organize by the election of a President, Secretary and Treasurer, from among their number, a majority of whom must be citizens of this State; they must give the bonds, and perform the duties enjoined on them by law, the articles of incorporation and the by-laws of the corporation. No order of the Directors is valid unless made by a majority and entered on the minutes of the Board, with the date thereof, and giving the names of the Directors present, and signed by the President and Secretary. All contracts or other valid orders or writings, made by the Directors or its officers, when directed by the by-laws or ordered by the Directors, must be over the corporate seal.

Stats. 1850, 347, Sec. 159 ; 1850, 373, Sec. 175 ; 1850,  
375, Sec. 189 ; 1853, 169, Sec. 4 ; 1861, 609, Sec. 4 ;  
1865-6, 743, Sec. 4 ; 1865-6, 754, Sec. 6.

Officers may  
be removed,  
how.

SEC. 309. At all general meetings of the stockholders or members, two-thirds in value of the subscribed stock or two-thirds of the members thereof being present in person or by proxy and voting therefor, any President, Director, or other officer of such corporation may be removed and others elected in their stead; previous notice of such intended removal must first be given as herein required for elections.

Stats. 1861, 610, Sec. 7.

Justice of  
the Peace  
may order  
meeting.

SEC. 310. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any Justice of the Peace of the county where such corporation is established, may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the Justice may in the same warrant direct such person to preside at such meeting until a clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat.

Stats. 1850, 347.

**SEC. 311.** At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented either in person or by proxy in writing. Every person acting therein in person, or by proxy or representative, must be a member thereof or a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election. Any vote or election had, other than in accordance with the provisions of this article, is prima facie fraudulent and void against absent stockholders or members, and may be set aside by petition to the District Court of the county where the same was held. Any regular or called meeting of the stockholders or members may adjourn from day to day or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election or majority vote had, such adjournment and the reasons thereof being recorded in the journal of proceedings of the Board of Directors.

Majority of stock must be represented and a majority vote together, otherwise it is fraudulent

Stats. 1861, 607, Secs. 5, 6; 1853, 169, Sec. 8.

**SEC. 312.** The shares of stock of an estate of a minor, insane or deceased person may be represented at all elections and meetings of the corporation, by the legal representative of the person holding the same, and any stockholder who has hypothecated his stock, except by transfer on the books of the corporation, may nevertheless represent such stock at all elections and meetings.

All stock may be represented in votes.

Stats. 1861, 610, Sec. 8; 1861, 567, Secs. 12, 13; 1853, 169, Sec. 8; 1863, 89, Secs. 11, 12; 1862, 199, Sec. 23.

**SEC. 313.** If, from any cause, an election does not take place on the day appointed in the by-laws or articles of incorporation, it may be held on any day thereafter, as is provided for in such by-laws or articles of incorporation, or to which such election may be adjourned or ordered by the Directors.

Election may be postponed.

Stats. 1850, 347, Sec. 168; 1853, 88, Sec. 6; 1862, 199, Sec. 7; 1861, 610, Sec. 8; 1863, 624, Sec. 10.

**SEC. 314.** Upon the application of any person or body corporate, aggrieved by any election held by any corporate body, or any proceedings thereof, the District Judge

Complaints and quo warrant as, and proceedings thereon regarding elections.

of the district in which such election is held must **pro-**ceed forthwith summarily to hear the affidavits, **proofs** and allegations of the parties, or otherwise inquire **into** the matters of complaint, and thereupon confirm **the** election, order a new one, or direct such other relief **in** the premises as accords with right and justice, and **may** direct the District Attorney to file information in **the** nature of quo warranto in the premises. Before any **pro-**ceedings are had under this section, five days notice thereof must be given to the adverse party or those **to** be affected thereby.

Stats. 1850, 347, Sec. 15.

Dividends  
to be from  
surplus  
profits.

SEC. 315. The Directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the Directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the Directors at the time, or were not present when the same did happen), are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such Directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence.

Stats. 1850, 348; 1861, 607, Sec. 50; 1865-6, 747, Sec. 12; 1865-6, 757, Sec. 13; 1861, 626, Sec. 56; 1853, 89, Secs. 13, 14.

False certifi-  
cate, report  
or notice, to  
make officers  
liable.

SEC. 316. Any officer of a corporation who makes or gives a certificate, official report, public notice, or entry in any of the records or books of the corporation, concerning their corporation or its business, which is false in

any material representation, and who knew or had full opportunity to know the same to be false, is liable for all the debts of the corporation contracted while he was a stockholder or officer thereof, and if more than one violates the provisions of this section in concert, they are jointly and severally liable.

Stats. 1861, 626, Sec. 55; 1865-6, 747, Sec. 16; 1853, 90, Sec. 19.

SEC 317. When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed.

Meeting by  
consent to be  
valid.

Stats. 1850, 347, Sec. 10.

SEC. 318. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

Proceedings  
at meeting  
to be binding

Stats. 1850, 347, Sec. 11.

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## CHAPTER II.

### CORPORATE STOCK.

#### ARTICLE I. STOCK AND STOCKHOLDERS.

#### II. ASSESSMENT OF STOCK.

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#### ARTICLE I.

##### STOCK AND STOCKHOLDERS.

SECTION 321. All corporations may call in subscriptions and enforce collections.

322. Liabilities of stockholders. They may be released, when.

323. Certificates, how and when issued.

324. Transfer of shares.

325. Transfer of shares held by married women, etc. Dividends payable to married women.

326. Non-resident stockholders. Bonds.

327. Debts not to exceed capital stock.

All corporations may call in subscriptions and enforce collections.

**Sec. 321.** Every corporation for profit, unless it is in this Part otherwise specially provided, may, by order of its Directors, demand and call in from the stockholders, at such times and in such amounts or instalments as the Directors may require, the sums by them subscribed, and may enforce the payment thereof either by suit or as provided hereinafter for levying and collecting assessments upon stock.

Stats. 1863-4, 492, Sec. 1; 1853, 88, Sec. 10; 1853, 169, Sec. 14; 1850, 372, Sec. 176; 1850, 375, Sec. 190; 1850, 376, Sec. 194.

Liabilities of stockholders

**Sec. 322.** Each stockholder or member of any corporation is severally, individually and personally liable for such proportion of all its debts and liabilities as the amount of stock or shares owned by him in such corporation bears to the whole of the subscribed capital stock or shares of the corporation, for the recovery of which joint or several actions may be instituted and prosecuted; and in any such action against any of the stockholders or members of a corporation, the Court must ascertain and determine the proportion of the debt which is the subject of the suit for which each of the stockholders or members who are defendants in the action are severally liable, and judgment must be given severally in conformity therewith. If any stockholder or member of a corporation pays his proportion of any debt due by such corporation, he is released and discharged from any further individual or personal liability for such debt. Stock held as collateral security, or by a Trustee, or in any other representative capacity, does not make the holder thereof a stockholder, but the pledgor, or person or estate represented, is the stockholder.

They may be released, when.

Stats. 1863, 766; 1865-6, 758, Sec. 17; 1853, 87, Sec. 16, 17; Const., Art. IV, Sec. 36.

Certificates, how and when issued.

**Sec. 323.** All corporations for profit must issue certificates for stock fully paid up, signed by the President and Secretary, and may provide, in their by-laws, for issuing partially paid certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

Stats. 1861, 614, Sec. 14.



SEC. 324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate thereof; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares and the date of the transfer.

Transfer of  
shares.

Stats. 1862, 111 ; 1861, 607, Sec. 12 ; 1853, 169, Sec. 13 ;  
1853, 85, Sec. 9 ; 1862, 199, Sec. 21.

SEC. 325. Shares of stock in corporations held or owned by a married woman may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a feme sole. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman, touching any shares of stock of any corporation owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried.

Transfer of  
shares held  
by married  
women, etc.

Dividends  
payable to  
married  
women.

Stats. 1861, 607, Sec. 12.

SEC. 326. In all transfers of shares of stock in corporations, on behalf of owners residing out of the State, the President, Secretary or Directors of such corporation, before entering such transfer on the books of the corporation or issuing the certificate therefor to the transferee, must require from such attorney, or from the person claiming under such transfer, a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or if not so satisfactory, then approved by the District Judge of the district in which the principal office of the corporation is situated, conditioned to protect such corporation against any liability to the legal representatives of the owner of such stock, in case of his or her death before such transfer; and in case of refusal to furnish such

Non-resident  
stockholders

Bonds.

bonds upon request, such transfer is utterly void as against the corporation.

Stats. 1862, 110, Sec. 12.

Debts not to exceed capital stock.

SEC. 327. The total amount of debts of any corporation must not at any time exceed the amount of the capital stock actually paid in; and in case of any excess, the Directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the Directors at the time, and except those who were not present when the same did happen, are, in their individual and private capacities, jointly and severally liable for such excess, to the corporation, and in the event of its dissolution, to any of the creditors thereof, to the full amount of such excess, with legal interest from the time such liability accrued; and no statute of limitation is a bar to any suit against such Directors for any sums of money for which they are made liable by this section.

Stats. 1850, 347, Sec. 14; 1861, 607, Sec. 56.

## ARTICLE II.

### ASSESSMENTS OF STOCK.

SECTION 331. Directors may levy assessments.

332. Limitation. How levied.

333. Majority of Board may order assessments.

334. What order shall contain.

335. Notice of assessment. Form.

336. Publication and service.

337. Delinquent notice. Form.

338. Contents of notice.

339. How published.

340. Jurisdiction acquired, how.

341. Sale to be by public auction.

342. Highest bidder to be the purchaser.

343. In default of bidders, corporation may purchase.

344. Disposition of stock purchased by corporation.

345. Extension of time of delinquent sale.

346. Assessments shall not be invalidated.

347. Action for recovery of stock, and limitation thereof.

348. Affidavits of publication. Affidavits of sale. To be filed.

Directors may levy assessments.

SEC. 331. The Directors of any corporation formed under the laws of this State, for the purpose of paying expenses, conducting business or paying debts, may levy

and collect assessments upon the capital stock thereof, in the manner and form and to the extent provided herein.

Stats. 1865-6, 458 ; 1861, 41, Sec. 1 ; 1863-4, 492, Sec. 1.

**SEC. 332.** No one assessment must exceed five per cent. of the amount of the capital stock named in the articles of incorporation, except as in this Part specially provided, and none must be levied while any portion of any previous assessment remains unpaid or uncollected, except in cases where all the powers of the corporation have been exercised, in accordance with the terms of this article, for the purpose of collecting such previous assessment, and except, also, the collection of a previous assessment against one or more stockholders is restrained by injunction or other process ; in which case a further assessment may be levied and collected, according to this article.

Limitation.

How levied.

Stats. 1865-6, 458, Sec. 2.

**SEC. 333.** No assessment must be levied, except by order of a majority of the Board of Directors, entered upon the records of the corporation.

Majority of Board may order assessments.

Stats. 1865-6, 458, Sec. 3.

**SEC. 334.** Every order levying an assessment must specify the amount thereof, when, to whom and where payable ; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment ; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

What order shall contain

Stats. 1865-6, 459, Sec. 4.

**SEC. 335.** Upon the making of the order, the Secretary shall cause to be published a notice thereof, in the following form :

Notice of assessment.

[Name of corporation in full. Location of works]. Notice is hereby given, that at a meeting of the Directors, held on the [date], an assessment of [amount] per share was levied upon the capital stock of the corporation, payable [when, to whom and where]. Any stock upon which this assessment shall remain unpaid on the [day fixed] will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the [day appointed] to pay the delinquent

Form.

assessment, together with costs of advertising and expenses of sale.

[Signature of Secretary, with location of office.]

Stats. 1868, 540, Sec. 3.

Publication  
and service.

SEC. 336. The notice must be published once each week for four successive weeks, in some daily or weekly paper published at the place designated in the articles of incorporation as the principal place of business, and also in some paper published in the county in which the works of the corporation are situated, if a paper is published therein; if the works of the corporation are not situated within some State or Territory of the United States, then publication in a paper of the county is not necessary; if there is no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in the newspaper published nearest thereto. The notice specified in the preceding section may be served by delivering a copy thereof, certified by the Secretary, to each stockholder personally; and in case of such service upon all the stockholders of the corporation, no notice by publication is necessary, but such personal notice is sufficient.

Stats. 1865-6, 459, Sec. 6.

Delinquent  
notice.

SEC. 337. If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the Secretary must, unless otherwise ordered by the Board of Directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:

Form.

[Name in full. Location of works]. NOTICE.—There is delinquent upon the following described stock, on account of assessment levied on the [date], [and assessments levied previous thereto, if any], the several amounts set opposite the names of the respective shareholders, as follows: [Names, number of certificate, number of shares, amount]. And in accordance with law [and an order of the Board of Directors, made on the (date), if any such order shall have been made], so many shares of each parcel of such stock as may be necessary will be sold, at the [particular place], on the [date], at [the hour] of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

[Name of Secretary, with location of office.]

Stats. 1863-4, 492, Sec. 2; 1865-6, 460, Sec. 7.

**SEC. 338.** The last named notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, separately, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon, together with the fact that the certificates for such shares have not been issued, must be stated.

Contents  
of notice.

Stats. 1865-6, 460, Sec. 8.

**SEC. 339.** The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

How  
published.

Stats. 1865-6, 460, Sec. 9.

**SEC. 340.** By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale.

Jurisdiction  
acquired,  
how.

Stats. 1865-6, 460, Sec. 10.

**SEC. 341.** On the day, at the place and at the time appointed in the notice of sale, the Secretary must, unless otherwise ordered by the Directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessment.

Sale to be by  
public auc-  
tion.

Stats. 1865-6, 460, Sec. 11.

**SEC. 342.** The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock

Highest bid-  
der to be the  
purchaser.

books of the corporation, on payment of the assessment and costs.

Stats. 1865-6, 460, Sec. 12.

In default of bidders, corporation may purchase.

SEC. 343. If, at the sale of stock, no bidder offers the amount of the assessments, and costs and charges due, the same may be bid in and purchased by the corporation, through the Secretary, President or any Director thereof, at the amount of the assessments, costs and charges due; and the amount of the assessments, costs and charges must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation must be made on the books thereof. While the stock remains the property of the corporation it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon and against the stockholders of the corporation.

Stats. 1865-6, 460, Sec. 13.

Disposition of stock purchased by corporation.

SEC. 344. All purchases of its own stock made by any corporation, in accordance with the provisions of the preceding section, vests the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock, for all purposes of election or voting on any question at a stockholder's meeting.

Stats. 1865-6, 461, Sec. 13.

Extension of time of delinquent sale.

SEC. 345. The dates fixed in any notice of assessment or notice of delinquent sale published according to the provisions hereof may be extended from time to time for not more than thirty days, by order of the Directors, entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.

Stats. 1865-6, 461, Sec. 14.

**Sec. 346.** No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew.

Assessments shall not be invalidated.

Stats. 1868, 540, Sec. 3.

**Sec. 347.** No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made.

Action for recovery of stock, and limitation thereof.

Stats. 1865-6, 461.

**Sec. 348.** The publication of notices required by this article may be proved by the affidavit of the printer, foreman or principal clerk of the paper in which the same was published; and the affidavit of the Secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the Secretary thereof as true, are prima facie evidence of the facts therein stated. Certificates, signed by the Secretary and under the seal of the corporation, are prima facie evidence of the contents thereof.

Affidavits of publication.

Affidavits of sale.

To be filed.

Stats. 1870, 229, Sec. 1.

## CHAPTER III.

## CORPORATE POWERS.

## ARTICLE I. GENERAL POWERS.

## II. LANDS AND RIGHT OF WAY.

## III. RECORDS.

## IV. EXAMINATION OF CORPORATION.

## V. JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

## ARTICLE I.

## GENERAL POWERS.

## SECTION 354. Powers of corporations.

355. Limitation of powers.

356. Banking expressly prohibited.

357. Liability of stockholders.

358. Majority to form Board for business.

359. Misnomer does not invalidate instrument.

360. Corporation to organize within one year.

361. Increasing and diminishing capital stock, how.

Powers of  
corporations

SEC. 354. Every corporation, as such, has power—

1. To have succession, by its corporate name, for the period limited ; and when no period is limited, perpetually.

2. To sue and be sued in any Court.

3. To make and use a common seal, and alter the same at pleasure.

4. To hold, purchase and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this Part.

5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation.

6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

7. To admit and remove members, and to sell their stock or shares for the payment of assessments or instalments.

8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.

Stats. 1850, 347 ; 1861, 85, Sec. 4 ; 1862, 540, Sec. 3 ;  
 N. Y. C. C., vol. 2, p. 125 ; Smith vs. Moore et als.,  
 2 Cal., 524 ; Gashwiler vs. Willis, 33 Cal., 19.



**SEC. 355.** In addition to the powers enumerated in the preceding section, and to those expressly given in that Title of this Part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given.

Limitation  
of powers.

Stats. 1850, 347, Sec. 2; Smith vs. Moore, 2 Cal., 524.

**SEC. 356.** No corporation shall create or issue bills, notes or other evidences of debt, upon loans or otherwise, for circulation as money.

Banking  
expressly  
prohibited.

Stats. 1850, 347, Sec. 3; 1853, 90, Sec. 15; Const., Art. IV, Sec. 35.

**NOTE.**—Sec. 35 of Art. IV of the Constitution provides that the Legislature shall prohibit “banking” by law; hence the necessity of this section. A general provision is inserted in this Code prohibiting the creation or circulation of a paper currency by any corporation. Thus is avoided the question whether the Constitution would be self-operating, were the Legislature to remain silent.

**SEC. 357.** Where the whole capital of a corporation is not paid in, and that paid in is insufficient to satisfy the claims of its creditors, each stockholder is bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter or articles of incorporation, or such proportion thereof as may be required to satisfy the debts of the corporation.

Liability of  
stockholder

Stats. 1850, 347, Sec. 4.

**SEC. 358.** When the corporate powers of any corporation are directed to be exercised by any particular body or number of persons, a majority of such body or persons is a sufficient number to form a Board for the transaction of business; and every decision of a majority of the persons duly assembled as a Board is valid as a corporate act.

Majority to  
form Board  
for business.

Stats. 1850, 347, Sec. 5; 1853, 88, Sec. 7; 1864-5, 31, Sec. 1; 1862, 199, Sec. 9.

**SEC. 359.** The misnomer of any corporation, in any written or printed instrument, does not invalidate the same, if it can be ascertained from the instrument what corporation is meant to be described.

Misnomer  
does not  
invalidate  
instrument.

Stats. 1862, 205, Sec. 26.

Corporation  
to organize  
within one  
year.

Sec. 360. If any corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this Part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the State or information of the Attorney-General.

Stats. 1862, 110, Sec. 1.

Increasing  
and dimin-  
ishing capi-  
tal stock,  
how.

Sec. 361. Every corporation may increase or diminish its capital stock as in this section provided:

1. By a majority vote of the Directors there may be called a meeting of the stockholders, to be convened for the purpose of increasing or of diminishing the capital stock.

2. Personal notice of the time and place of such meeting, and the object thereof, must be served on each stockholder resident in this State; or, in lieu thereof, the notice must be published in every issue of a newspaper published in the county where the principal place of business is located, for four weeks successively.

3. The notice must also contain the amount to which it is proposed to increase or diminish the capital stock.

4. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the works which may be the object or purpose of the corporation to construct.

5. At least four-fifths of all the capital stock must be represented at such meeting, and at least two-thirds of the entire capital stock must vote in favor of such increase or diminution before the same is effected.

6. A certificate, signed and verified by the Chairman and Secretary of the meeting, must be made, showing a strict compliance with all the requirements of this section; the amount to which the capital stock has been increased or diminished; the amount of stock (and by whom held) represented at the meeting; the vote by which the object was accomplished; the amount of capital stock actually paid in, and the amount of all debts and liabilities of the corporation, and how secured.

7. This certificate must be subscribed by a majority of the Directors, and duplicates made, one to be filed in the office of the County Clerk and one in the office of the Secretary of State, as provided for original articles of incorporation, and thereupon the capital stock is so increased or diminished.

[New section.]      Stats. 1850, 347, Secs. 153, 196; 1853, 87, Sec. 20; 1858, 169, Sec. 25; 1865-6, 747, Sec. 17; 1861, 567, Secs. 14, 15, 16; 1862, 199, Secs. 18, 19, 20; 1867-8, 325, Sec. 4; 1863, 91, Secs. 20, 21, 22.

NOTE.—Since, under this Code, no association of persons or capital can become a corporate body until a certain percentage of a fixed proportion of the capital stock named and subscribed is paid in to their Treasurer, and thus the capital stock named may be, of necessity, smaller than desirable if the corporation proves a success, facility for increasing the capital stock is by this section provided.

Experimental and prospecting corporations may thus readily comply with the Code, and at the same time deception is prevented.

## ARTICLE II.

### LANDS AND RIGHT OF WAY.

- SECTION 365. Corporations may acquire real estate, and how much.
- 366. State lands granted for use of corporations.
- 367. Grant not to embrace town lots.
- 368. Wood, stone and earth may be taken from State lands.
- 369. Corporations failing to comply with provisions, to take no grant.
- 370. Lands to revert to State, when.
- 371. Selections made, how proved and certified to.
- 372. County, city and town property, how acquired.
- 373. Administrators and guardians may convey lands of estates, how.

SEC. 365. No corporation shall acquire or hold any more real estate than may be absolutely necessary for the use of the business conducted or the construction of their works, except as specially provided, and every such corporation may exercise the right of eminent domain to acquire such necessary real estate, as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, when needed for the uses and purposes therein mentioned.

Corporations may acquire real estate, and how much.

[New section.]

State lands  
granted for  
use of cor-  
porations.

SEC. 366. There is granted to every corporation the right of way for the location, construction and maintenance of their necessary works, and for every necessary adjunct thereto, over any swamp, overflowed or other public lands of the State not otherwise disposed of or in use, not in any case exceeding in length or width that which is necessary for the construction of such works and adjuncts, or for the protection thereof, not in any case to exceed two hundred feet in width.

Stats. 1861, 617, Sec. 20.

Grant not to  
embrace  
town lots.

SEC. 367. The grants mentioned in the preceding section do not apply to public lands of the State within the corporate limits of towns and cities, or within three miles thereof. Such lands, not exceeding two square acres in each case, may be condemned as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, to the use of such corporation, on payment to the State the value thereof, ascertained in such proceedings. The grants for adjuncts, not exceeding two acres of land, must not be nearer each other than five miles along the course or line of the works.

Stats. 1861, 617, Secs. 20, 21.

Wood, stone  
and earth  
may be  
taken from  
State lands.

SEC. 368. The right to take from any of the lands belonging to the State, adjacent to the works of the corporation, all materials, such as wood, stone and earth, naturally appurtenant thereto, which may be necessary and convenient for the original construction of its works and adjuncts, is granted to such corporations as shall, in all respects, comply with the provisions of this Part and Title limiting such grants and the holding of lands.

Stats. 1861, 618, Sec. 20.

Corporations  
failing to  
comply with  
provisions,  
to take no  
grant.

SEC. 369. A corporation formed under this Part, which fails or neglects to comply strictly with the provisions thereof regulating its formation, and directing and restricting the conduct of its affairs, takes nothing, either of the lands of the State or appurtenances thereto, herein granted.

Stats. 1861, 618, Sec. 20.

Lands to  
revert to  
State, when.

SEC. 370. If any corporation receiving State lands or appurtenances thereunder is dissolved, ceases to exist, is discontinued, or the route or line of its works is so changed as not to cover or cross the lands selected, or

the use of the lands selected is abandoned, such selected lands revert, and the title thereto is reinvested in the State, free from all such uses or trusts.

[New section.] Stats. 1861, 618, Sec. 20.

SEC. 371. When any selection of the right of way, or land for an adjunct to the works of a corporation, is made by any corporation, the Secretary thereof must transmit to the Surveyor-General, Controller of State, and Recorder of the county in which the selected lands are situate, a plat of the lands so selected, giving the extent thereof and uses for which the same is claimed or desired, duly verified to be correct; and, if approved, the Surveyor-General must so indorse the plat, and issue to the corporation a permit to use the same, unless, on petition properly presented to the Court, a review is had and such use prohibited.

Selections made, how proved and certified to.

[New section.] Stats. 1861, 618, Sec. 22.

SEC. 372. When the lands of any county, city or town are required to be used by any corporation, in conformity with the law regulating the transfer thereof, the proper officers of any such county, city or town may convey the same by deed (with or without compensation, as may be agreed upon), to such corporation; if not so conveyed by agreement, such lands may be condemned as private lands are provided to be condemned, under Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

County, city and town property, how acquired.

[New section.] Stats. 1861, 618, Sec. 21.

SEC. 373. For the same purposes, the lands or any interest therein of infants, idiots, insane or deceased persons, may be conveyed by the guardian, executor or administrator thereof, on application therefor to the proper Probate Court, after appraisement and notice to all persons interested, as in other cases of disposal of lands under order of the Probate Court. The sale must not be for less than three-fourths of the appraised value; and after report and approval thereof by the Court, and the payment of the purchase money, a deed must be executed. If such lands or interest cannot be thus obtained, corporations may acquire the same by proceeding under Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

Administrators and guardians may convey lands of estate, how.

[New section.] Stats. 1861, 619, Sec. 23.

## ARTICLE III.

## RECORDS.

SECTION 377. Records—of what, and how kept.

378. Other records to be kept by corporations for profit, and others.

Records—of  
what, and  
how kept.

SEC. 377. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their Directors, members or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized and the notice thereof given. The record must embrace every act done or ordered to be done; who were present and who absent; and, if requested by any Director, member or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom; on a similar request, the ayes and noes must be taken on any proposition, and a record thereof made; on similar request, the protest of any Director, member or stockholder, to any action or proposed action, must be entered in full; all such records to be open to the inspection of any Director, member, stockholder or creditor of the corporation.

Stats. 1861, 607, Sec. 11; 1853, 169, Sec. 22; 1853, 90, Sec. 18.

Other  
records to be  
kept by cor-  
porations for  
profit, and  
others.

SEC. 378 In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept a record of all stock; the names of the stockholders or members alphabetically arranged; instalments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary, and none other.

[New section.]

Stats. 1861, 607, Sec. 11; 1853, 169, Sec. 22.

## ARTICLE IV.

## EXAMINATION OF CORPORATIONS, ETC.

SECTION 382. Examination into affairs of corporation, how made by officers of State.

383. Examination made by the Legislature.

384. Chapter and article may be repealed.

SEC. 382. The Attorney-General or District Attorney, whenever and as often as required by the Governor, must examine into the affairs and condition of any corporation in this State, and report such examination, in writing, together with a detailed statement of facts, to the Governor, who must lay the same before the Legislature; and for that purpose the Attorney-General or District Attorney may administer all necessary oaths to the Directors and officers of any corporation, and may examine them on oath in relation to the affairs and condition thereof, and may examine the books, papers and documents belonging to such corporation or appertaining to its affairs and condition.

Examination into affairs of corporation, how made by officers of State.

Stats. 1850, 350, Sec. 29.

SEC. 383. The Legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this State at all times; and, for that purpose, any committee appointed by the Legislature, or either branch thereof, may administer all necessary oaths to the Directors, officers and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers and documents by summary process, to be issued on application to any Court of record or any Judge thereof, under such rules and regulations as the Court may prescribe.

Examination made by the Legislature.

Stats. 1850, 350, Sec. 29.

SEC. 384. The Legislature may at any time amend or repeal this Part, or any Title, chapter, article or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any

Chapter and article may be repealed.

remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

Stats. 1850, 347, Sec. 30 ; Const., Art. IV, Sec. 31.

NOTE.—The Act of February 20th, 1862, p. 17, relates to confirmation of mortgages and mortgage sales occurring prior thereto. It is not deemed essential to retain this Act. So, also, with the Act of April 1st, 1864, p. 303.

## ARTICLE V.

### JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

SECTION 388. Franchise may be treated as property, and sold under execution.

389. Purchaser to transact business of corporation.

390. Purchaser may recover penalties, etc.

391. Corporation to retain powers after sale.

392. Redemption of franchise.

393. When proceedings under execution may be had.

Franchise may be treated as property, and sold under execution.

SEC. 388. For the satisfaction of any judgment against a corporation organized for profit, the franchise and all the rights and privileges thereof, together with all its corporate property, may be levied upon and sold under execution, in the same manner and with like effect as property of individuals is levied upon and sold under execution, as provided for such sales in the CODE OF CIVIL PROCEDURE.

[New section.] Stats. 1850, 347, Sec. 20.

Purchaser to transact business of corporation.

SEC. 389. The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and to derive the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided.

[New section.]

Purchaser may recover penalties, etc

SEC. 390. The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name



of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalty thus had is a bar to any subsequent action by or on behalf of the corporation for the same.

[New section.] **NOTE.**—For this change in the law it is deemed sufficient simply to refer to *Monroe vs. Thomas* (5 Cal., 470), *Thomas vs. Armstrong* (7 Cal., 286), and *Wood vs. Truckee Turnpike Company* (24 Cal., 487).

**SEC. 391.** The corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures, as before such sale.

Corporation to retain powers after sale.

Stats. 1850, 347, Sec. 26.

**SEC. 392.** The corporation may, at any time within one year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent. interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof reverts and belongs to the corporation, as if no such sale had been made.

Redemption of franchise.

**NOTE.**—This provision should be placed, also, under the head of "Redemptions," in the Code of Civil Procedure.

**SEC. 393.** All the proceedings respecting the levy of executions may be had in any county in which the creditor, the President, or any Director, or the Treasurer, or the Clerk of the corporation may reside, or in which the corporation has personal or real estate.

When proceedings under execution may be had.

Stats. 1850, 347, Sec. 28.

## CHAPTER IV.

### EXTENSION AND DISSOLUTION OF CORPORATIONS.

**SECTION 399.** Proceedings to disincorporate.

400. Receivers and Directors of dissolved corporations.

401. On dissolution, Directors to be Trustees for creditors.

402. Powers of such Trustees.

403. Corporations, how dissolved.

**SECTION 404.** Any corporation may extend its corporate existence, how.

405. How corporations may continue their existence.

406. Tit. I to apply to all corporations, with certain exceptions.

407. Definitions.

Proceedings  
to disincor-  
porate.

**SEC. 399.** Any corporation may dissolve and disincorporate itself by proceedings in the County Court, as provided in Tit. VI, Part III, CODE OF CIVIL PROCEDURE, it being first determined by a vote of two-thirds of the stockholders or members thereof to disincorporate and dissolve the corporation.

Stats. 1850, 347, Sec. 31 ; 1853, 91, Sec. 24 ; 1853, 169, Sec. 28 ; 1862, 199, Sec. 24.

Receivers  
and Direc-  
tors of  
dissolved  
corporations

**SEC. 400.** Upon the dissolution of any corporation by decree of a Court of competent jurisdiction, the Court may appoint one or more persons, with or without bond, to be Receivers or Trustees of the corporation.

Stats. 1850, 347, Secs. 16, 18 ; 1852, 199, Sec. 25.

On dissolu-  
tion, Direc-  
tors to be  
Trustees for  
creditors.

**SEC. 401.** Unless other persons are appointed by the Court, the Directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, are Trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, as provided in the preceding section.

Stats. 1857, 347, Sec. 16 ; 1853, 169, Sec. 27 ; 1853, 91, Sec. 23 ; 1852, 199, Sec. 25.

**NOTE.**—This section, applicable to many of our corporations, is extended to all.

Powers of  
such Trust-  
tees.

**SEC. 402.** The Trustees or Receivers may sue for and recover all debts and property of the dissolved corporation, in the name of the Directors or Trustees thereof, and settle the affairs thereof, and are jointly and severally responsible to the creditors, stockholders and members of such corporation, to the extent of its property and effects that comes into their hands.

Stats. 1850, 347, Sec. 17.

Corpora-  
tions, how  
dissolved.

**SEC. 403.** Proceedings to dissolve corporations, other than by the corporations themselves, as hereinbefore provided, must be had under Chap. V, Tit. X, Part II, of the CODE OF CIVIL PROCEDURE.

Stats. 1850, 347, Sec. 19—modified.

**SEC. 404.** Every corporation heretofore formed, for any purpose enumerated in this Title for which corporations may be formed, for a period of time less than fifty years, may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension must be made at a meeting of the stockholders or members, after such order of the Directors and notice thereof, with such amount of capital stock or number of members represented and such affirmative vote thereof as required herein for the increase or diminution of the capital stock, and filing a certificate thereof in the same offices where their articles of incorporation are filed.

Any corporation may extend its corporate existence, how.

[New section.] Stats. 1870, 364, Secs. 1, 2.

**SEC. 405.** All corporations may continue their existence for an additional period, not exceeding fifty years, by filing a certificate, duly sworn to by the President and Secretary, as provided for the filing of the original articles of incorporation, setting forth that, at a meeting of four-fifths of the members or stock, and on a two-thirds vote thereof, it was determined to continue such corporation for such additional length of time; the meeting of the stockholders or members to be had after notice thereof, published for four weeks in some newspaper in the county where the principal office of the corporation is located, giving the time and place of meeting; or, in lieu thereof, personal notice of such time and place of meeting may be served on all stockholders or members resident in this State. The notice to specify the object of the meeting and the length of time for which it is proposed to continue the corporation.

How corporations may continue their existence.

[New section.] Stats. 1856, 758, Sec. 15.

**SEC. 406.** All corporations are subject to the provisions of this Title, unless in that one of the Titles following, specially applicable to them, they are specially excepted, or a special provision is therein made for such corporation, differing from the general provision on the same subject.

Tit. I to apply to all corporations, with certain exceptions.

[New section.]

**SEC. 407.** The words "stockholders" and "stock," used in this Title, apply alone to corporations for profit

Definitions.

having a capital stock; the word "members" applies to corporations organized for purposes other than profit.

[New section.] **NOTE.**—The Act of March 1st, 1870, on pages 107-8, which authorizes corporations to amend their articles of incorporation, has been omitted. The machinery provided for effecting this amendment is rather cumbersome; besides, the policy of permitting corporations to change the purposes for which they were originally organized, irrespective of whether the business to be embraced in the amendment is germane to that then being conducted, is of a doubtful character, to say the least. Whenever such radical changes are necessary or beneficial to the stockholders, a dissolution and re-incorporation may be had as herein provided, with but little more delay than to amend the articles of incorporation.

## TITLE II.

### INSURANCE CORPORATIONS.

#### CHAPTER I. GENERAL PROVISIONS.

#### II. FIRE AND MARINE INSURANCE CORPORATIONS.

#### III. MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

### CHAPTER I.

#### GENERAL PROVISIONS.

**SECTION 413.** To comply with requirements of Insurance Commissioner.

414. Subscriptions to capital stock opened, and how collected.

415. Purchase and conveyance of real estate.

416. Policies, how issued and by whom signed.

417. Dividends, of what, and when declared.

418. Directors liable for loss on insurance in certain cases.

To comply  
with re-  
quirements  
of Insurance  
Commis-  
sioner.

**SEC. 413.** Every insurance corporation must, before commencing to transact its business, and at all times thereafter, comply with the requirements of the chapter on *Insurance Commissioner*, in Part I of the **POLITICAL CODE**.

**SEC. 414.** After the Secretary of State issues the certificate of incorporation, as provided in Art. I, Chap. I,

Tit. I, of this Part, the Directors named in the articles of incorporation must proceed in the manner specified therein, or in their by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; to levy assessments and instalments thereon, and to collect the same, as in Tit. I provided.

Subscriptions to capital stock opened, and how collected.

[New section.] Stats. 1865-6, 755, Sec. 8; 743, Sec. 14.

SEC. 415. No insurance corporation must purchase, hold or convey real estate, except for the purposes, and as hereinafter set forth, to wit:

Purchase and conveyance of real estate.

1. Such as is requisite for its accommodation in the convenient transaction of its business, not exceeding in value one hundred and fifty thousand dollars.

2. Such as shall have been conveyed to it, or to any person for it, by way of mortgage or in trust, or otherwise, to secure or provide for the payment of loans previously contracted, or for moneys due.

3. Such as shall have been purchased at sales upon deeds of trust, or judgments, decrees or mortgages obtained or made for such loans or debts.

4. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

All such real estate so acquired, and which is not requisite for the accommodation of such corporation in the transaction of its business, must be sold and disposed of within five years after such corporation shall have acquired title to the same. No such real estate must be held for a longer period than five years, unless the corporation first procures a certificate from the Insurance Commissioner that the interest of the corporation will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the Insurance Commissioner directs in the certificate.

Stats. 1865-6, 756; 1867-8, 341.

SEC. 416. All policies made by insurance corporations must be subscribed by the President or Vice President, or, in case of the death, absence or disability of those officers, by any two of the Directors, and countersigned

Policies, how issued and by whom signed.

by the Secretary of the corporation. All such policies are as binding and obligatory upon the corporation as if executed over the corporate seal.

Stats. 1865-6, 748, Sec. 20.

Dividends,  
of what, and  
when de-  
clared.

SEC. 417. The Directors of every insurance corporation, at such times as their articles of incorporation or by-laws provide, must make, declare and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on their capital stock invested as to them appears advisable; but the moneys received and notes taken for premium on risks which are undetermined and outstanding at the time of making the dividend must not be treated as profits, nor divided, except as provided in Chap. II of this Title.

Stats. 1865-6, 748, Sec. 21.

Directors  
liable for loss  
on insurance  
in certain  
cases.

SEC. 418. If any insurance corporation is under liabilities for losses to an amount equal to its capital stock, and the President or Directors, after knowing the same, shall make any new or further insurance, the estates of all who make such insurance, or assent thereto, are severally and jointly liable for the amount of any loss which takes place under such insurance.

Stats. 1865-6, 748, Sec. 18.

## CHAPTER II.

### FIRE AND MARINE INSURANCE CORPORATIONS.

SECTION 423. Capital to be at least one hundred thousand dollars.

424. Payment of subscriptions. Capital to be all paid in twelve months.

425. Certificate of capital stock paid up to be filed, and when.

426. Property which may be insured.

427. Funds may be invested, how.

428. Rate of risk.

429. Amounts to be reserved before making dividends.

430. Amounts to be reserved by companies with less than two hundred thousand dollars capital.

Capital to be  
at least one  
hundred  
thousand  
dollars.

SEC. 423. No company, corporation or association shall hereafter be formed or organized under the laws of this State, for the transaction of business in any kind of

insurance, except live stock, without a subscribed capital equal at least to one hundred thousand dollars in United States gold coin, twenty-five per cent. whereof shall be paid in previous to the issue of any policy, and the balance by monthly or quarterly instalments within twelve months from the day of filing the certificate of incorporation. Nor shall any individual or person be permitted to transact business as agent of any non-resident person or corporation, whether foreign or domestic, in any kind of insurance, except live stock, except such person or corporation shall possess available cash assets, exclusive of stock notes, to the amount of at least one hundred thousand dollars in United States gold coin, over and above all liabilities except capital.

[New section.]      **NOTE.**—This section was suggested by the San Francisco Board of Underwriters.

**SEC. 424.** The Directors of every fire and marine corporation may levy, demand and call in from the stockholders thereof, such percentage of the capital stock subscribed by them respectively, in such assessments or instalments as they may deem proper. Notice of such levy must be given and such proceedings had for the collection of the same as is provided in Chap. II, Tit. I, of this Part, for the collection of assessments. The entire capital stock in cash must be paid in within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent. of the whole capital stock is paid up.

Payment of  
subscriptions.

Capital to be  
all paid in  
twelve  
months.

Stats. 1865-6, 743, Sec. 5.

**SEC. 425.** The President and a majority of the Directors must, within thirty days after the payment of the twenty-five per cent. of the capital stock, and also within thirty days after the payment of the last instalment or assessment of the capital stock limited and fixed, prepare, subscribe and swear to a certificate setting forth the amount of the fixed capital and the amount thereof paid up at the times respectively in this section named, and file the same in the office of the County Clerk of the county where the principal office of the corporation is located,

Certificate of  
capital stock  
paid up to be  
filed, and  
when.

and a duplicate thereof, similarly executed, with the Insurance Commissioner.

Stats. 1865-6, 743, Sec. 10.

Property  
which may  
be insured.

SEC. 426. Every corporation formed for fire and marine insurance, or either of such objects, may make insurance upon vessels, freight, money, treasure, goods and effects, and upon money lent upon bottomry and respondentia, and upon other interests lawfully insurable; and they may also make insurance against fire on any dwelling house or other building, and on merchandise or other property, wherever situated; and they may cause themselves to be reinsured, at the discretion of the officers thereof.

Stats. 1865-6, 743, Sec. 8.

Funds may  
be invested,  
how.

SEC. 427. Every fire and marine insurance company has power, either by its Board of Directors or by its Finance or Executive Committee, as the by-laws may direct, to invest its funds in loans upon real estate or personal securities, or by purchases of stocks, bonds or other securities, but no loan must be made on the stock of the company as security.

[New section.]

NOTE.—This new section was suggested by the San Francisco Board of Underwriters.

Rate of risk.

SEC. 428. Fire and marine insurance corporations must never take, on any one risk, whether it is a marine insurance or an insurance against fire, a sum exceeding one-tenth part of their capital actually paid in, without reinsuring the excess above one-tenth.

Stats. 1865-6, 747, Sec. 15.

Amounts to  
be reserved  
before  
making  
dividends.

SEC. 429. No corporation transacting fire, marine or inland insurance business under the laws of this State, must make any dividends, except from profits remaining on hand after retaining, unimpaired—

1. The entire subscribed capital stock.
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks.
3. A fund equal to one-half of the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend.
4. A sum sufficient to pay all losses reported, or in



course of settlement, and all liabilities for expenses and taxes.

Stats. 1867-8, 328, Sec. 8.

SEC. 430. No fire, marine or inland insurance corporation, with a subscribed capital of less than two hundred thousand dollars, must declare any dividends, except from profits remaining on hand after reserving—

Amounts to be reserved by companies with less than two hundred thousand dollars capital.

1. A sum necessary to form, with the subscribed capital stock, the aggregate sum of two hundred thousand dollars.

2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks.

3. A fund equal to one-half the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend.

4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

Stats. 1867-8, 328, Sec. 9.

### CHAPTER III.

#### MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

SECTION 437. Capital stock. Guarantee Fund.

438. Of what Guarantee Fund shall consist.

439. What constitutes, and deficiency in fixed capital.

440. Declaration of fixed capital to be filed.

441. Guarantee notes and interest, how disposed of.

442. Insured to be entitled to vote, when.

443. May invest in what securities.

444. Number of Directors may be altered, how.

445. Limitations to the holding of stock and in other particulars may be provided for in by-laws.

446. Premiums, how payable.

447. Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when. How estimated.

448. No stamp required on accident insurance contract.

SEC. 437. Every corporation formed for the purpose of mutual insurance on the lives, or any period less than life, of persons, on the health or against accidents to them, for life or any fixed period of time, or to purchase and sell annuities, must have a capital stock of not less

Capital stock

(Guarantee  
Fund.

than one hundred thousand dollars. It must not make any insurance upon any risk or transact any other business as a corporation until its capital stock is fully paid up in cash, nor until it has also obtained a fund, to be known as a "Guarantee Fund," of not less than two hundred and fifty thousand dollars, as is hereinafter provided. If more than the requisite amount is subscribed, the stock must be distributed pro rata among the subscribers. Any subscription may be rejected by the Board of Directors or the committee thereof, either as to the whole or any part thereof, and must be, so far as rejected, without effect.

Stats. 1865-6, 753, 755, Secs. 1, 8.

Of what  
Guarantee  
Fund shall  
consist.

SEC. 438. The Guarantee Fund mentioned in the preceding section must consist of the promissory notes of solvent parties, approved by the Board of Directors and by each other, payable to the corporation or its order, and at such times, in such modes and in such sums, with or without interest, and conformable in all other respects to such requirements as the Board of Directors prescribe; but the amount of the notes given by any one person must not exceed in the whole the sum five thousand dollars, exclusive of interest. Such notes must be payable absolutely and at the option of the corporation; they must be negotiable, and may be indorsed and transferred, or converted into cash, or otherwise dealt with by the corporation, at its discretion, without reference to any contingency of losses or expenses. Such notes, or the proceeds thereof, must remain with the corporation as a fund for the better security of its dealers, and constitute the assets of the corporation, liable for all its debts, obligations and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings, over and above its expenses, losses and liabilities, shall have accumulated in cash, or securities in which the net earnings have been invested, to a sum which, with the capital stock, is equal to the aggregate of the original amounts of the Guarantee Fund and of the capital stock.

Stats. 1865-6, 755, Sec. 9.

What con-  
stitutes, and  
deficiency in  
fixed capital

SEC. 439. The sum accumulated as provided in the preceding section, together with the capital stock, shall

*Miller*

become and remain the fixed capital of the corporation, not subject to division among the stockholders or parties dealing with it, or to be expended in any manner otherwise than may be required in payment of the corporation's debts and actual expenses, until the business of the corporation is closed, its debts paid, and its outstanding policies and obligations of every kind cancelled or provided for; and if from any cause a deficiency at any time occurs in such fixed capital, no further division of profits shall take place until such deficiency has been made up.

Stats. 1865-6, 755, Sec. 9.

SEC. 440. Whenever the fixed capital of the corporation is obtained as hereinbefore provided, the President of the corporation and its Actuary, or its Secretary, if there is no Actuary, must make a declaration in writing, sworn to before some Notary Public, of the amount of such fixed capital, and of the particular kinds of property composing the same, with the nature and amount of each kind, which must be filed with the original articles of incorporation, and a copy, certified by the County Clerk, must be published for at least four weeks, in a newspaper published in the place where the principal office of the corporation is situated. Upon the filing of such declaration the Guarantee Fund is discharged of its obligations, and all notes of the fund remaining in the control of the corporation, and not affected by any lien thereon, or claim in that nature, must be surrendered by it to the makers thereof, respectively, or other parties entitled to receive the same.

Declaration  
of fixed cap-  
ital to be  
filed.

Stats. 1865-6, 756, Sec. 10.

SEC. 441. Until the Guarantee Fund is discharged from its obligations, as provided in the preceding section, no note must be withdrawn from the fund, unless another note of equal solvency is substituted therefor, with the unanimous approval of the Board of Directors then in office, and of all other parties liable on the rest of the notes comprising the Guarantee Fund. The corporation must allow a commission of five per cent. per annum on all such guarantee notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon, at the rate of twelve per cent. per annum, payable half yearly, until repaid by the corporation. But

Guarantee  
notes and  
interest, how  
disposed of.

such rate of interest may, from time to time, at intervals of not less than one year, be increased or reduced by the Board of Directors, so as to conform to the then current rates of interest.

Stats. 1865-6, 756, Sec. 10.

Insured to  
be entitled  
to vote,  
when.

SEC. 442. After the filing of the declaration of the fixed capital, as in this article provided, the holders of policies of life insurance for the term of life, on which the premiums are not in default, may vote at the election of Directors, and have one vote for each one thousand dollars insured by their policies, respectively.

Stats. 1865-6, 754, Sec. 5.

May invest  
in what  
securities.

SEC. 443. The number of Directors specified in the articles of incorporation may be altered from time to time, during the existence of the corporation, by resolution, at the annual meeting of a majority of those entitled to vote at the election of Directors, but the number must never be reduced below seven.

Stats. 1865-6, 754, Sec. 5.

Number of  
Directors  
may be  
altered, how.

SEC. 444. Life, health and accident insurance corporations may invest their capital stock as follows :

1. In loans upon unencumbered and improved real estate within the State of California, which shall be worth at the time of the investment at least fifty per cent. more than the sum loaned.

2. In the purchase of or loans upon interest-bearing stocks, bonds and other securities of the United States, and of the States thereof.

3. In the purchase of or loans upon interest-bearing bonds of any incorporated city, or city and county in the State of California.

4. In the purchase of or loans upon any stocks of companies and corporations formed under the laws of this State, *except mining stocks*; which shall have, at the time of the investment, a value, in the City and County of San Francisco, of not less than sixty per cent. of their par value, and which shall be rated as first class securities.

But no loans shall be made on any securities specified in Subds. 2, 3 and 4, of this section, in any amount beyond seventy-five per cent. of the market value of the securi-

ties, nor shall any loan be made on the stock of the corporation making the loan.

Stats. 1867-8, 661; 1865-6, 748, Sec. 18.

NOTE.—The exception of mining stocks is here made to conform to what was evidently the intention of the Legislature, but which, as printed in the statutes, was grossly perverted and reversed.

SEC. 445. The corporation may, by its by-laws, limit the number of shares which may be held by any one person, and make such other provisions for the protection of the stockholders and the better security of those dealing with it, as to a majority of the stockholders may seem proper, not inconsistent with the provisions of this Title or Part.

Limitations to the holding of stock and in other particulars may be provided for in by-laws.

Stats. 1865-6, 754, Sec. 7.

SEC. 446. All premiums must be payable wholly in cash, or one-half or a greater proportion in cash, and the remainder in promissory notes bearing interest, as may be provided for by the by-laws. Agreements and policies of insurance made by the corporation may be upon the basis of full or partial participation in the profits, or without any participation therein, as may be provided by the by-laws and agreed between the parties.

Premiums, how payable.

Stats. 1865-6, 758, Sec. 16.

SEC. 447. Every life insurance corporation doing business in this State, or formed under the provisions of this Part, must, on or before the first Monday in January of each year, furnish the Insurance Commissioner the necessary data for determining the valuation of all its policies outstanding on the thirty-first day of December next preceding; which valuation must be based upon the rate of mortality as established by the American experience life table. The rate of interest to be assumed must be four and one-half per cent. per annum.

Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when.

How estimated.

Stats. 1870, 859, Sec. 1.

NOTE.—This section will, in the bill prepared for the Legislature, be also placed in the chapter on *Insurance Commissioner*. The first section of this chapter requires all corporations doing the business of insurance to be governed by the provisions of the chapter on *Insurance Commissioner*.

No stamp  
required on  
accident  
insurance  
contract.

**SEC. 448.** No stamp is required nor stamp duty exacted on any contract of insurance, when such contract insures against accident which may result in injury or death.

Stats. 1865-6, 171, Sec. 1.

**NOTE.**—This chapter has been examined by the San Francisco Board of Underwriters, their proposed amendments have been incorporated, and, as presented, is approved by them.

## TITLE III.

### RAILROAD CORPORATIONS.

#### CHAPTER I. OFFICERS AND CORPORATE STOCK. II. ENUMERATION OF POWERS. III. BUSINESS, HOW CONDUCTED.

### CHAPTER I.

#### OFFICERS AND CORPORATE STOCK.

**SECTION 453.** Directors to be elected, when.

454. Assessments of stock, how made and collected.

455. Additional provisions in assessment and transfer of stock.

456. Corporations may borrow money and issue bonds. Limitation of amount.

457. To provide a Sinking Fund to pay bonds.

458. Capital stock to be fixed.

459. Certificate of payment of fixed capital stock.

Directors to  
be elected,  
when.

**SEC. 453.** Directors of railroad corporations may be elected at a meeting of the stockholders other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide, or as may be declared in the articles of incorporation; notice thereof to be given as provided for notices of meetings to adopt by-laws, in Art. II, Chap. I, Tit. I, of this Part.

Stats. 1870, 577, Sec. 1.

Assessments  
of stock, how  
made and  
collected.

**SEC. 454.** The Directors of railroad corporations may, by order, demand and call in from the stockholders, at such times as they may deem proper, the sums by them

subscribed to the capital stock, in equal instalments of not more than ten per cent per month, unless in the articles of incorporation it is otherwise stipulated. Assessments to be levied and collected as provided in Chap. II, Tit. I, of this Part.

Stats. 1861, 613, Sec. 13 ; 1863, 610, Sec. 4.

SEC. 455. No stock in any railroad corporation is transferable until all the previous calls or instalments thereon have been fully paid in, nor is any such transfer valid except as between the parties thereto, unless at least twenty per cent. has been paid thereon and certificates issued therefor, and the transfer approved by the Board of Directors.

Additional provisions in assessment and transfer of stock.

Stats. 1861, 607, Sec. 12 ; 1863, 613, Sec. 3.

SEC. 456. Railroad corporations may borrow, on the credit of the corporation, and under such regulations and restrictions as the Directors thereof, by unanimous concurrence, may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum ; may also issue bonds or promissory notes of the same denomination and rate of interest, in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto. The amount of bonds or promissory notes issued for such purposes must not exceed, in all, the amount of their capital stock ; and to secure the payment of such bonds or notes, they may mortgage their corporate property and franchise.

Corporations may borrow money and issue bonds.

Limitation of amount.

Stats. 1861, 610 ; Sec. 15 ; 1862, 547, Sec. 1.

SEC. 457. The Directors must provide a Sinking Fund, to be specially applied to the redemption of such bonds, on or before their maturity, and may also confer on any holder of any bond or note so issued, for money borrowed, or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon, into stock of such corporation, at any time within eight years from the date

To provide a Sinking Fund to pay bonds.

of such bonds, under such regulations as the Directors may adopt.

Stats. 1861, 610, Sec. 15 ; 1862, 547, Sec. 1.

Capital stock  
to be fixed.

SEC. 458. When, at any time after filing the articles of incorporation, it is ascertained that the capital stock therein set out is either more or less than actually required for constructing, equipping, operating and maintaining the road, by a two-third vote of the stockholders the capital stock must be fixed, and a certificate thereof, and of the proceedings had to fix the same, must be made out and filed in the office of the Secretary of State.

Stats. 1861, 610, Sec. 6.

Certificates  
of payment  
of fixed  
capital stock

SEC. 459. Within thirty days after the payment of the last instalment of the fixed capital stock of any railroad corporation, organized under this Title and Part, the President and Secretary, and a majority of the Directors thereof, must make, subscribe and file in the office of the Secretary of State a certificate, stating the amount of the fixed capital stock and that the whole thereof has been paid in. The President and Secretary must swear to the truth of the certificate before filing the same.

Stats. 1861, 610, Sec. 16.

## CHAPTER II.

### ENUMERATION OF POWERS.

#### SECTION 465. Enumeration of powers.

1. To survey road.
  2. May accept real estate.
  3. May acquire real estate.
  4. Lay out road, how wide.
  5. Where may construct road.
  6. May cross or connect roads.
  7. May purchase land, timber, stone, gravel, etc.
  8. Carry persons and freight.
  9. Erect necessary buildings.
  10. Regulate time and freights, subject to legislation.
  11. Regulate force and speed.
  12. Subject to Tit. I of this Part.
466. Map and profile to be filed.
467. May change line of road.
468. Forfeiture of franchise.
469. Crossings and intersections. Condemnation.



**Section 470.** Not to use streets, alleys or water, in cities or towns, except by a two-third vote of the city or town authorities.

**471.** Railroads through cities not to charge fare to and from points therein.

**472.** When crossing railroads or highways, how other lands are acquired.

**473.** Corporations may consolidate. Publication of notice. Copy to be filed.

**Sec. 465.** Every railroad corporation has power—

Enumera-  
tion of  
powers.  
To survey  
road.

1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes, their officers, agents and employes, may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto.

2. To receive, hold, take and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it, to aid and encourage the construction, maintenance and accommodation of such railroad.

May accept  
real estate.

3. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold and use all such real estate and other property, as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots and other purposes, necessary to successfully work and conduct the business of the road.

May acquire  
real estate.

4. To lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same.

Lay out road,  
how wide.

5. To construct their road across, along or upon any stream of water, water course, roadstead, bay, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected, to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise.

Where may  
construct  
road.

6. To cross, intersect, join or unite its railroad with any other railroad, either before or after construction, at

May cross or  
connect  
roads.

any point upon its route, and upon the grounds of such other railroad corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections and connections, the same shall be ascertained and determined as is provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

May purchase land, timber, stone, gravel, etc.

7. To purchase lands, timber, stone, gravel or other materials, to be used in the construction and maintenance of its road and all necessary appendages and adjuncts, or acquire them in the manner provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the Directors so determine, as is provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation.

Carry persons and freight.

8. To carry persons and property on their railroad, and receive tolls or compensation therefor.

Erect necessary buildings.

9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery, for the accommodation and use of their passengers, freight and business.

Regulate time and freights, subject to legislation.

10. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, subject to be altered, changed or amended by the Legislature at any time.

Regulate force and speed.

11. To regulate the force and speed of their locomotives, cars, trains or other machinery used and employed on their road, and to establish, execute and enforce all needful and proper rules and regulations for the management of its business transactions, usual and proper for railroad corporations.

Subject to Tit. I of this Part.

12. To possess all the powers and be subject to all the provisions of Tit. I of this Part, so far as the same are not in conflict or inconsistent with the provisions of this Title.

**SEC. 466.** Every railroad corporation in this State must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land acquired for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the Secretary of State; and also like maps of the parts thereof located in different counties, and file the same in the office of the Clerk of the county in which such parts of the road are, there to remain of record forever. The maps and profiles must be certified by the Chief Engineer, the Acting President and Secretary of such company, and copies of the same, so certified and filed, be kept in the office of the Secretary of the corporation, subject to examination by all parties interested.

Map and  
profile to be  
filed.

Stats. 1861, 621, Sec. 34.

**SEC. 467.** If, at any time after the location of the line of the railroad, and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the Directors may, as provided in Subd. 7, Sec. 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location, within five years after such change. No new location, as herein provided, must be so run as to avoid any points named in their articles of incorporation.

May change  
line of road.

Stats. 1861, 616, Sec. 18.

**SEC. 468.** Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.

Forfeiture  
of franchise.

Stats. 1861, 626, Sec. 54; 1870, 578, Sec. 2.

**SEC. 469.** Whenever the track of one railroad intersects or crosses the track of another railroad, whether

Crossings  
and inter-  
sections.

Condemnation.

the same be a street railroad wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under Tit. VII, Part III, CODE OF CIVIL PROCEDURE, and the damages assessed and the right of way granted as in other cases.

Stats. 1862, 498, Sec. 2.

Not to use streets, alleys or water, in cities or towns, except by a two-third vote of the city or town authorities.

SEC. 470. No railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third vote of the town or city authority from which the right must emanate.

NOTE.—This is a limitation upon Sec. 367, general provisions of corporations.

Railroads through cities not to charge fare to and from points therein.

SEC. 471. No railroad corporation, other than street railroads, availing itself of the provisions of the preceding section and acquiring right of way from city authorities, shall ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration, from any point to another in the same city.

Stats. 1861, 618, Sec. 21.

When crossing railroads or highways, how other lands are acquired.

SEC. 472. Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over or on a level with the track, as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and material as are necessary for the construction of such road or highway on such new line. If such other necessary lands cannot be had otherwise, they may be condemned as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, and when compensation is made therefor, the same becomes the property of the corporation.

Stats. 1861, 617, Sec. 19.

**Sec. 473.** Two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises, in such manner as may be agreed upon by their respective Boards of Directors. No such amalgamation or consolidation must take place without the written consent of the holders of three-fourths in value of all the stock of each corporation; and no such amalgamation or consolidation must, in any way, relieve such corporation or the stockholders thereof from any and all just liabilities. In case of such amalgamation or consolidation, due notice of the same must be given, by advertisement for one month, in at least one newspaper in each county, if there be one published therein, into or through which such roads run, and also for the same length of time in one paper published in Sacramento, and in two papers published in San Francisco; and when the consolidation and amalgamation is completed, a copy of the new articles of incorporation must be filed in the office of the Secretary of State.

Corporations may consolidate.

Publication of notice.

Copy to be filed.

Stats. 1861, 622, Sec. 40.

## CHAPTER III.

### BUSINESS, HOW CONDUCTED.

**Section 479.** Checks to be affixed to all baggage. Damages.

480. Annual report to be verified. Form of report.

481. Duties of corporation.

482. Corporation to pay damages for refusal.

483. Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

484. Corporations to post printed regulations, and not responsible for damages in violation of rules.

485. To pay damages. Not liable in certain cases. Corporation may recover damages, when.

486. Regulations of trains. Penalty.

487. Conductor may eject passengers, when.

488. Officers to wear badge.

489. Rates of charges.

490. Passenger tickets, how issued and to be good for six months.

491. Character of iron to be used.

**Sec. 479.** A check must be affixed to every package or parcel of baggage, when taken for transportation by any agent or employé of such railroad corporation, and a

Checks to be affixed to all baggage

Damages.

duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars, to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare, the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employé of the railroad corporation, he may recover the value thereof from the corporation.

Stats. 1861, 623, Sec. 42.

Annual report to be verified.

SEC. 480. Every railroad corporation must make an annual report to the Secretary of State, or other officer designated by law, of its operations for each year, ending on the thirty-first day of December, verified by the oaths of the President or Acting Superintendent of operations, the Secretary and Treasurer of such corporation, and file it in the office of the Secretary of State or such other designated officer by the twentieth day of February, which must state—

Form of report.

1. The capital stock and the amount thereof actually paid in.

2. The amount expended for the purchase of lands for the construction of the road, for buildings, and for engines and cars, respectively.

3. The amount and nature of its indebtedness, and the amount due the corporation.

4. The amount received from the transportation of passengers, property, mails and express matter, and from other sources.

5. The amount of freight, specifying the quantity in tons.

6. The amount paid for repairs of engines, cars, buildings, and other expenses, in gross, showing the current expenses of running such road.

7. The number and amount of dividends, and when paid.

8. The number of engine houses and shops, of engines and cars, and their character.

A report must also be made to the Governor and Surveyor-General of the State, as required by Chap. III, Title on *Public Ways*, POLITICAL CODE.

Stats. 1861, 624, Sec. 44.

**SEC. 481.** Every such corporation must start and run their cars, for the transportation of persons and property, at such regular times as they shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto offer, or is offered, for transportation, at the place of starting, at the junction of other railroads, and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of tolls, freight or fare therefor.

Duties of corporation.

Stats. 1861, 624, Sec. 45.

**SEC. 482.** In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which is sustained thereby, with costs of suit.

Corporation to pay damages for refusal.

Stats. 1861, 624, Sec. 46.

**SEC. 483.** Every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars.

Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

[New section.] Stats. 1861, 625, Sec. 48.

**SEC. 484.** Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the cor-

Corporations to post printed regulations, and not responsible for damages in violation of rules.

poration failed to comply with the provisions of the preceding section.

[New section.] Stats. 1861, 625, Sec. 48.

To pay damages.

Not liable in certain cases

Corporation may recover damages, when.

SEC. 485. Railroad corporations must make and maintain a good and sufficient fence on either, or both sides, of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals, upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents or employés.

Stats. 1861, 623, Sec. 40.

Regulations of trains.

Penalty.

SEC. 486. A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway, under a penalty of one hundred dollars for every neglect, to be paid by the corporation owning the railroad, which may be recovered in an action prosecuted by the District Attorney of the proper county, for the use of the State. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train or cars, when the provisions of this section are not complied with.

Stats. 1861, 623, Sec. 41.



**SEC. 487.** If any passenger neglects or refuses to pre-pay his fare or toll upon demand, the conductor of the train or the employés of the corporation may put him out of the cars at any stopping place the conductor may elect, unless the passenger pays or tenders him an amount at least ten per cent. more than the fixed fare not so pre-paid.

Conductor  
may eject  
passengers,  
when.

Stats. 1861, 626, Sec. 49.

**SEC. 488.** Every conductor, baggage-master, engineer, brakeman or other employé of any railroad corporation, employed on a passenger train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive, from any passenger, any fare, toll or ticket, or exercise any of the powers of his office or station; and no other officers or employés, without such badge, has any authority to meddle or interfere with any passenger or property.

Officers to  
wear badge.

Stats. 1861, 626, Sec. 50.

**SEC. 489.** All railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another, on their various lines of road in this State, graded as follows:

Rates of  
charges.

1. One rate of charges per mile for a distance of one hundred miles or over.

2. One rate for a distance of seventy-five and less than one hundred miles, charging not exceeding ten per cent. per mile more than the first rate.

3. One rate for a distance of fifty and less than seventy-five miles, charging not exceeding fifteen per cent. per mile more than the first rate.

4. One rate for a distance of twenty-five and less than fifty miles, charging not exceeding twenty per cent. per mile more than the first rate.

5. One rate for a distance not exceeding twenty-five miles, charging not exceeding twenty-five per cent. per mile more than the first rate.

But in no case, nor in any class of charges hereinbefore named, shall any railroad corporation charge or receive

more than ten cents per mile for each passenger, nor fifteen cents per mile for each ton of freight, transported on its road. For every transgression of these limitations the corporation is liable to the party suffering thereby treble the entire amount of fare or freightage so charged to such party. In no case is the corporation required to receive less than twenty-five cents for any one lot of freight for any distance.

[New section.] Stats. 1861, 626, Sec. 51.

NOTE.—The provision fixing grades of charges is in accordance with the statutes of the States of Maine, Missouri, Kansas and others, and frequent suggestions in this State. In Kansas and Missouri six cents per mile is the maximum charge for passenger fare, and freightage is graded something like the provisions of this section. We have not disturbed the existing law fixing a maximum of freightage and fares, but, to produce a systematic uniformity, require grades to be fixed based upon distance alone. It would be clearly a wrong to allow a charge for one hundred miles to be doubled for an intermediate distance of fifty miles.

Passenger tickets, how issued and to be good for six months.

SEC. 490. Every railroad corporation must provide, and on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars.

[New section.]

NOTE.—The change here proposed makes a ticket for which value has been paid by a holder available at any time within six months. No good reason can be assigned why passengers should not be protected as well as others against inevitable accidents. A slight inconvenience to a corporation ought not to deprive one of small means of all consideration or convenience.

Character of iron to be used.

SEC. 491. All railroads, other than street railroads and those used exclusively for carrying freight or for

mining purposes, built by corporations organized under this chapter, must be constructed of the best quality of iron rail, known as T rail or H rail, or other pattern of equal utility.

Stats. 1861, 626, Sec. 57 ; 1862, 498, Sec. 1.

## TITLE IV.

### STREET RAILROAD CORPORATIONS.

- SECTION 497.** Authority to lay street railroad track, how obtained,  
**498.** Restrictions and limitations to the grant of the right of way.  
**499.** May make further regulations and rules.  
**500.** Penalty for overcharging.  
**501.** To provide and furnish passenger tickets. Penalty.  
**502.** Trial, proof and limitation.  
**503.** City or town to reserve certain rights.  
**504.** License to be paid to city or town.  
**505.** Track for grading purposes.  
**506.** What provisions of Tit. III are applicable to street railroads.

**SEC. 497.** Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained, for a term of years not exceeding fifty, from the Trustees, Council or other body to whom is entrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided.

Authority to lay street railroad track, how obtained.

Stats. 1870, 481, Sec. 1.

**SEC. 498.** The city or town authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require them—

Restrictions and limitations to the grant of the right of way.

1. To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be as nearly as possible in the middle thereof.

2. To plank, pave or macadamize the entire length of the street used by their track, between the rails and for

two feet on each side thereof, and to keep the same constantly in repair and with good crossings.

3. That the tracks must not be more than five feet wide within the rails, and a space between the track sufficient to allow the cars to pass each other freely.

4. Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroads occupy and use the same street or track for a distance of more than five blocks.

5. Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chap. II, Tit. III, of this Part.

6. In laying down track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days.

7. The rates of fare on the cars must not exceed ten cents for one fare, for any distance under three miles.

8. The cars must be of the most approved construction for comfort and convenience of passengers, and provided with brakes to stop the same when required.

9. The rate of speed must not be greater than eight miles per hour. A violation of this provision subjects the corporation to a fine of one hundred dollars for each offence.

10. Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way, such abandonment and consent to be in writing.

Stats. 1870, 482, Secs. 1, 6; 1863, 296, Sec. 1.

May make  
further reg-  
ulations and  
rules.

SEC. 499. Cities and towns, in or through which street railroads run, may make such further regulations for the government of such street railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein.

Stats. 1870, 483, Sec. 10.

**SEC. 500.** Any corporation, or agent or employé thereof, demanding or charging a greater sum of money for fare on the cars of such street railroad than that fixed, as provided in this Title, forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any Justice's Court having jurisdiction thereof, against the corporation.

Penalty for  
overcharg-  
ing.

Stats. 1863, 297, Sec. 1.

**SEC. 501.** Every street railroad corporation must provide, and, on request, furnish to all persons desiring a passage on their cars, any required quantity of passenger tickets or checks, each to be good for one ride. Any corporation failing so to provide and furnish tickets or checks to any person desiring to purchase the same, at not exceeding the rate hereinbefore fixed, must pay to such person the sum of two hundred dollars, to be recovered as provided in the preceding section.

To provide  
and furnish  
passenger  
tickets.

Penalty.

Stats. 1863, 297, Sec. 1.

**SEC. 502.** Upon the trial of any action for the forfeiture named in the two preceding sections, proof that the person demanding or receiving such sum of money as fare, or for the sale of such ticket or check, was, at the time of making such demand or receiving such moneys, engaged on or at any car, omnibus or vehicle of any railroad belonging to such corporation, is prima facie evidence that such person so demanding or receiving such moneys was the agent, servant or employé of the corporation so owning, using or employing such railroad. The suit must be instituted within thirty days from and after the cause of action shall have accrued.

Trial, proof  
and limita-  
tion.

Stats. 1863, 297, Secs. 3, 5.

**SEC. 503.** Every city, town, or city and county, granting the right to construct street railroads within its limits, must reserve the right to grade, sewer, pave, macadamize or otherwise improve, alter or repair the streets or highways permitted to be used by the corporation; the work to be so done by the city or town as to obstruct the railroad as little as possible, and when such works make the

City or town  
to reserve  
certain  
rights.

same necessary, the corporation may shift their rails so as to avoid the obstructions made thereby.

Stats. 1870, 483, Sec. 9.

License to be  
paid to city  
or town

SEC. 504. Each street railroad corporation must pay to the authorities of the city, town, county, or city and county, as a license upon each car, such sum as the authorities may fix, not exceeding fifty dollars per annum in the City of San Francisco, nor more than twenty-five dollars per annum in other cities or towns; where any street railroad connects or runs through two or more cities or towns, a proportionate or equal share of such license must be paid to each of the cities or towns; and no such license money is due the county authorities where the same is paid to any city or town authority.

Stats. 1870, 483, Sec. 10.

Track for  
grading  
purposes.

SEC. 505. The right to lay down a track for grading purposes, and maintain the same for a period not to exceed three years, may be granted by the corporate authorities of any city or town, or Supervisors of any city or county, but no such track must remain more than three years upon any one street; and it must be laid level with the street, and must be operated under such restrictions as not to interfere with the use of the street by the public. The corporate authorities of any city or town may grant the right to use steam or any other motive power in propelling the cars used on such grading track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time is reserved.

Stats. 1870, 483, Sec. 11.

What provi-  
sions of Tit  
III are appli-  
cable to  
street rail-  
roads.

SEC. 506. All the provisions of Tit. III of this Part are applicable to street railroads, unless where street railroads are therein specially excepted, or the provisions are palpably inapplicable.

NOTE.—The reference is to the Title on *Railroads*, with those sections excepted which obviously cannot be applicable.

## TITLE V.

## WAGON ROAD CORPORATIONS.

**SECTION 512.** Three Commissioners to act with surveyor.

513. Survey and map to be filed, and approved by Supervisors.

514. Tolls, etc., to be collected. Penalty for taking unlawful tolls.

515. No tolls to be charged on highways or public roads.

516. Rates of toll to be posted at gate.

517. Toll-gatherer may detain persons until they pay toll.

518. Toll-gatherer not to detain any person unnecessarily.

519. Persons avoiding tolls to pay five dollars.

520. Penalties for trespasses on property of corporation.

521. When capital invested is repaid, tolls to be reduced, etc.

522. May mortgage and hypothecate corporate property.

**SEC. 512.** Three Commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the Board of Supervisors of the county through which the road is to run and one by the corporation, who must lay out the proposed road and report their proceedings, together with a map of the road, to the Supervisors who appointed them, as provided in the succeeding section.

Three Commissioners to act with surveyor.

Stats. 1853, 114, Sec. 2.

**SEC. 513.** When the route is surveyed, a map thereof must be submitted to and filed with the Board of Supervisors of each county through or into which the road runs, giving its general course and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the Supervisors must either approve or reject the survey; if approved, it must be entered of record on the journal of the Board, and such approval authorizes the use of all public lands and highways over which the survey runs, but the Board of Supervisors must require the corporation, at its own expense, and the corporation must so change and open the highway so taken and used, as to make the same as good as they were before the appropriation thereof; and must so construct all crossings of public highways over and by its road, and its toll gates, as not to hinder or obstruct the use of the same.

Survey and map to be filed, and approved by Supervisors.

Stats. 1854, 74, Sec. 1.

Tolls, etc., to  
be collected.

**SEC. 514.** All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their road, ferries or bridges, as are fixed by the Board of Supervisors of the proper county through which the road passes or in which the ferry or bridge is situate, except, that in the Counties of Trinity, Shasta, Klamath, Butte, Siskiyou, Del Norte, Plumas, Humboldt and Sierra, the Directors may fix their own tolls; but in no case must the tolls be more than sufficient to pay fifteen per cent. nor less than ten per cent. per annum on the cost of construction, after paying for repairs and other expenses for attending to the road, bridges or ferries. If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise and must pay to the party so charged one hundred dollars as liquidated damages.

Stats. 1857, 280, Sec. 1.

Penalty for  
taking un-  
lawful tolls.

No tolls to be  
charged on  
highways or  
public roads.

**SEC. 515.** When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll gate or take tolls for the use of such highway or public road by teamsters, travellers, drovers or any one transporting property over the same.

Stats. 1853, 114, Sec. 3.

Rates of toll  
to be posted  
at gate.

**SEC. 516.** The corporation must affix and keep up, at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded.

Stats. 1853, 176, Sec. 30.

Toll-gath-  
erer may de-  
tain persons  
until they  
pay toll.

**SEC. 517.** Each toll-gatherer may prevent from passing through his gate persons leading or driving animals or carriages subject to toll, until they shall have paid respectively the tolls authorized to be collected.

Stats. 1853, 176, Sec. 29.

Toll-gath-  
erer not to  
detain any  
person un-  
necessarily.

**SEC. 518.** Every toll-gatherer who, at any gate, unreasonably hinders or delays any traveller or passenger liable to the payment of toll, or demands and receives from any person more than he is authorized to collect, for each offence forfeits the sum of ten dollars to the person aggrieved.

Stats. 1853, 176, Sec. 31.



**SEC. 519.** Every person who, to avoid the payment of the legal toll, with his team, carriage or horse, turns out of a turnpike road or plank road, or passes any gate thereon on ground adjacent thereto, and again enters upon such road, for each offence forfeits the sum of five dollars to the corporation injured.

Persons avoiding tolls to pay five dollars.

Stats. 1853, 176, Sec. 33.

**SEC. 520.** Every person who—

1. Wilfully breaks, cuts down, defaces or injures any mile-stone or post on any turnpike or plank road; or,

2. Wilfully breaks or throws down any gate on such road; or,

3. Digs up or injures any part of such road or anything thereunto belonging; or,

4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

For each offence forfeits to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act.

Penalties for trespasses on property of corporation.

Stats. 1853, 176, Sec. 32.

**SEC. 521.** The entire revenue derived from the road shall be appropriated, first, to repayment to the corporation the costs of its construction, with fifteen per cent. per annum interest thereon, together with the incidental expenses incurred in collecting tolls and keeping the road in repair. When the repayment is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay incidental expenses and to keep the road in good repair.

When capital invested is repaid, tolls to be reduced, etc.

Stats. 1853, 114, Sec. 4.

**SEC. 522.** The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair their road, but no mortgage or hypothecation is valid or binding unless at least twenty-five per cent. of the capital stock subscribed has been paid in and invested in the construction of the road and appurtenances, and then only after an affirmative vote of two-thirds of the capital stock subscribed.

May mortgage and hypothecate corporate property.

Stats. 1853, 173, Sec. 19.

## TITLE VI.

## BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.

SECTION 528. Corporation to obtain license from Supervisors.

529. In what contingencies corporate existence ceases.

530. President and Secretary to make annual report, and what to contain. Damages for failing to report.

Corporation  
to obtain  
license from  
Supervisors.

SEC. 528. No corporation must construct or take tolls on a bridge, ferry, wharf, chute or pier, until authority is granted therefor by the Supervisors, pursuant to the provisions of the POLITICAL CODE.

In what con-  
tingencies  
corporate  
existence  
ceases.

SEC. 529. Every such corporation ceases to be a body corporate—

1. If, within six months from filing its articles of incorporation, it has not obtained authority from the Board of Supervisors, and if, within one year thereafter, it has not commenced the construction of the bridge, wharf, chute or pier, and actually expended thereon at least ten per cent. of the capital stock of the corporation.

2. If, within three years from filing the articles of incorporation, the bridge, wharf, chute or pier is not completed, as required by the POLITICAL CODE.

3. If, when the bridge, wharf, chute or pier of the corporation is destroyed, it is not reconstructed and ready for use within three years thereafter.

4. If the ferry of any such corporation is not in running order within three months after authority is obtained to establish it, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

Stats. 1850, 347, Sec. 169.

President  
and Secre-  
tary to make  
annual re-  
port, and  
what to  
contain.

SEC. 530. The President and Secretary of all bridge, ferry, wharf, chute and pier corporations must annually, under oath, report to the Board of Supervisors of the county in which their articles of incorporation are filed—

1. The cost of constructing and providing all necessary appendages and appurtenances for their bridge, ferry, wharf, chute or pier.

2. The amount of all moneys expended thereon, since its construction, for repairs and incidental expenses.

3. The amount of their capital stock, how much paid in and how much actually expended thereof.

4. The amount received during the year for tolls and from all other sources, stating each separately.

5. The amount of dividends made, and the indebtedness of the corporation, specifying for what it was incurred.

6. Such other facts and particulars respecting the business of the corporation as the Board of Supervisors may require.

This report the President and Secretary must cause to be published, for four weeks, in a daily newspaper published nearest the bridge, if required by order of the Board of Supervisors. A failure to make such report subjects the corporation to pay to the State two hundred dollars liquidated damages, and for every week permitted to elapse after such failure, fifty dollars damages. All such cases to be reported by the Board of Supervisors to the District Attorney, who must institute suit therefor, and the certificate of the Clerk of the Board of Supervisors of such failure is presumptive proof thereof.

Damages for failing to report.

Stats. 1850, 347, Secs. 170, 173.

## TITLE VII.

### TELEGRAPH CORPORATIONS.

**SECTION 536.** May use right of way along waters, roads and highways.

537. Persons liable for damages for injuring telegraph property.

538. Party guilty of wilful and malicious injury, liable to one hundred times actual damages.

539. Conditions on which damage to sub-aqueous cable may be recovered.

540. Duty to send paid dispatch.

541. May dispose of certain rights.

542. Rates of charges to be fixed, and how published.

**SEC. 536.** Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers or abutments, for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as

May use right of way along waters, roads and highways.

not to incommode the public use of the road or highway, or interrupt the navigation of the waters.

Stats. 1857, 171, Sec. 1.

Persons  
liable for  
damages for  
injuring  
telegraph  
property.

SEC. 537. Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph corporation, is liable to the corporation for all damages sustained thereby. Any vessel which, by dragging its anchor or otherwise, breaks, injures or destroys the sub-aqueous cable of a telegraph corporation, subjects its owner to the damages hereinbefore specified.

Stats. 1850, 347, Sec. 152; 1857, 171, Sec. 2; 1862, 290, Sec. 8.

Party guilty  
of wilful and  
malicious  
injury, liable  
to one hun-  
dred times  
actual  
damages.

SEC. 538. Any person who wilfully and maliciously does any injury to any telegraph property mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any Court of competent jurisdiction.

Stats. 1862, 290, Sec. 8.

Conditions  
on which  
damage to  
sub-aqueous  
cable may be  
recovered.

SEC. 539. No telegraph corporation can recover damages for the breaking or injury of any sub-aqueous telegraph cable, unless such corporation has previously erected, on either bank of the waters under which the cable is placed, a monument, indicating the place where the cable lies, and publishes for one month, in some newspaper most likely to give notice to navigators, a notice, giving a description and the purpose of the monuments, and the general course, landings and termini of the cable.

Stats. 1857, 171, Sec. 3.

Duty to send  
paid dis-  
patch.

SEC. 540. Any corporation owning or working any telegraph line in this State, on the payment of the usual charges therefor, as established by its rates, must receive all dispatches from any person, and transmit the same with impartiality and good faith to the person to whom the same is directed; and for any neglect or refusal so to do, such corporation forfeits the sum of five hundred dollars, to be recovered, with costs of suit, by the person desiring to send the same.

Stats. 1850, 347, Sec. 154; 1861, 84, Sec. 5.

**SEC. 541.** Any telegraph corporation may at any time, with the consent of the persons holding two-thirds of the issued stock of the corporation, sell, lease, assign, transfer or convey any rights, privileges, franchises or property of the corporation, except its corporate franchise.

May dispose  
of certain  
rights.

Stats. 1861, 84, Sec. 6.

**SEC. 542.** Every telegraph corporation must fix uniform rates of charges proportionate to the number of miles, which must be uniform throughout the State, and publish them, by posting such rates at each of their offices in use.

Rates of  
charges to be  
fixed, and  
how pub-  
lished.

[New section.]

## TITLE VIII.

### WATER AND CANAL CORPORATIONS.

**SECTION 548.** Corporation may obtain contract to supply city or town.

549. Duties of corporation. Rates fixed by Commissioners.

550. Right to use streets, ways, alleys and roads.

551. To build and keep bridges in repair.

**SEC. 548.** No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted, by contract or otherwise, for a term exceeding fifty years.

Corporation  
may obtain  
contract to  
supply city  
or town.

Stats. 1852, 171, Sec. 3.

**SEC. 549.** All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water, to the extent of their means, in case of fire or other great necessity, free of charge. The rates to be

Duties of  
corporation.

Rates fixed  
by Commis-  
sioners.

charged for water must be determined by a Board of Commissioners, to be selected as follows: Two by the city and county, or city or town authorities, and two by the water company; and in case they cannot agree to the valuation they must choose a fifth member of the Board; if the four Commissioners cannot agree upon a fifth, then the County Judge of the county must appoint such fifth person. The decision of the majority of the Board determines the rates to be charged for water for one year, and until new rates are established. The Board of Supervisors, or the proper city or town authorities, may prescribe other proper rules relating to the delivery of water, not inconsistent with the laws of this State.

Stats. 1858, 219, Sec. 4.

Right to use  
streets,  
ways, alleys  
and roads.

SEC. 550. Any corporation created under the provisions of this Part, for the purposes named in this Title, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town, city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city or county, or through or into any part or parts thereof.

Stats. 1868, 220, Sec. 5.

To build and  
keep bridges  
in repair.

SEC. 551. Every canal corporation must construct and keep in good repair at all times, for public use, across their canal, flume or water pipe, all of the bridges that the Board of Supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways; and all water works must be so laid and constructed as not to obstruct public highways.

Stats. 1862, 541, Sec. 4.

## TITLE IX.

## HOMESTEAD CORPORATIONS.

**SECTION 557.** Time of corporate existence.

558. By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand.

559. Advertisement and sale of delinquent and forfeited shares.

560. May borrow and loan funds—how, and for what time.

561. Minor children, wards and married women may own stock.

562. Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.

563. When corporation is terminated, and how.

564. Payment of premiums.

565. Annual report to be published.

**SEC. 557.** Corporations organized for the purpose of acquiring lands in large tracts, paying off encumbrances thereon, improving and subdividing the same into homestead lots or parcels, and distributing them among the shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than ten years.

Time of corporate existence.

Stats. 1861, 567, Secs. 1, 3; 1867-8, 539, Sec. 1.

**SEC. 558.** Such corporations must specify in their by-laws the times when the instalments of the capital stock are payable, the amount thereof, and the fines, penalties or forfeitures incurred in case of default, and a printed copy of the articles of incorporation and by-laws shall be furnished to any shareholder on demand.

By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand. Advertisement and sale of delinquent and forfeited shares.

**SEC. 559.** Whenever any shares of stock are declared forfeited by resolution of the Board of Directors, the Directors may advertise the same for sale, giving the name of the subscriber and the number of shares, by notice of not less than three weeks, published at least once a week, in a newspaper of general circulation in the city, town or county where the office or principal place of business of such corporation is located, or in case no newspaper is published there, then in the newspaper published nearest to the place where the place of business is. Such

sale must be made at auction, under the direction of the Secretary of the company. The corporation may be a bidder, and the shares must be disposed of to the highest bidder, for cash. No defect, informality or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made the Secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all instalments then due and all expenses and charges of sale, must hold the residue subject to the order of the delinquent subscriber.

Stats. 1863-4, 492; 1867-8, 540, Sec. 1.

May borrow  
and loan  
funds—how,  
and for what  
time.

**SEC. 560.** Homestead corporations may borrow money for the purposes of the corporation, not exceeding at any one time one-fourth of the aggregate amount of the shares or parts of shares and the income thereof; no greater rate of interest must be paid therefor than twelve per cent. per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the surety of the unsold shares, on the land thus purchased, or that owned by the corporation at the time of procuring the loan, any sum of money which, together with the interest contracted to become due thereon, will not exceed ninety per cent. of the unpaid amount subscribed by the stockholders; but no loan must be made to the corporation, payment whereof is to be made after the expiration of the term of existence specified in the articles of incorporation.

Stats. 1870, 474, Sec. 1; 1861, 567, Sec. 5.

**NOTE.**—There can be no good reason assigned for having a surplus of cash on hand by a homestead corporation; much less can there be for loaning it to its own members, hence we have omitted Sec. 18 of the Act of 1861.

Minor chil-  
dren, wards  
and married  
women may  
own stock.

**SEC. 561.** Such shares of stock in homestead corporations as may be acquired by, and on which the deposits and assessments are paid from the personal earnings of, children, or with gifts to them other than those from their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire similarly, with the personal earnings of themselves or their children, voluntarily be-



stowed therefor, or from property bequeathed or given to them by persons other than their husbands.

Stats. 1861, 567, Sec. 6.

**Sec. 562.** Homestead corporations must not purchase and sell, or otherwise acquire and dispose of real property or any interest therein, or any personal property, for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property, or any interest therein, which in the aggregate exceeds in cash value the sum of two hundred thousand dollars. For any violation of the provisions of this section corporations forfeit their corporate rights and powers. On the application of any citizen to a Court of competent jurisdiction such forfeiture may be adjudged, and the judgment carries with it costs of the proceedings.

Forfeiture for speculation in or owning lands exceeding two hundred thousand dollars.

[New section.]

**Sec. 563.** Every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this Part, except for the purpose of winding up and settling its affairs. No dividends of funds must be had on termination of its corporate existence until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the Directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or, upon the application of a majority in interest of the stockholders, must sell and dispose of any or all of the real estate of the corporation upon such terms as may be most conducive to the interests of all the stockholders, and must convey the same to the purchaser and distribute the proceeds among the shareholders, or may at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided into lots and distributed, by sale for premiums, at auction or otherwise, among the shareholders.

When corporation is terminated, and how.

Stats. 1861, 567, Sec. 7; 1870, 474, Sec. 1.

**Sec. 564.** The Directors may demand payment of the premiums on lots at the time they are bid off, and if not

Payment of premiums.

so paid on any lot of land, may immediately offer the same for sale again. If any shareholder fails to pay the amount bid by him on any lot or lots of land, on the day the same is made due and payable, the Directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner provided in the by-laws for the sale of shares on account of delinquent instalments and premiums.

Stats. 1870, 474, Sec. 1.

Annual report to be published.

SEC. 565. The actual financial condition of all homestead corporations must, by the Directors thereof, be published annually in the newspaper published nearest the principal place of business of the corporation, for four weeks, if in a weekly, and two weeks, if in a daily. The statement to be made up to the end of the fiscal year, and verified by the oath of the President and Secretary, showing the items of property and liabilities.

Stats. 1861, 567, Sec. 8.

NOTE.—We are indebted to H. B. Congdon, Esq., Secretary of the Land and Building Association, for many valuable suggestions and amendments to the above Title.

## TITLE X.

### SAVINGS AND LOAN CORPORATIONS.

SECTION 571. May loan money—on what terms, how and to whom, and how long.

572. Capital stock, and rights and privileges thereof.

573. No dividends, except from surplus profits. To contract no liability, except for deposits.

574. Property which may be owned by corporations, and how disposed of. Restrictions in purchases as provided above.

575. Married women and minors may own stock in their own right.

576. May issue transferable certificates of deposit. Special certificates.

577. To provide Reserve Fund for the payment of losses.

578. Prohibition on Director and officer, and what vacates office.

May loan money—on what terms, how and to whom, and how long.

SEC. 571. Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders and depositors, may loan and invest the funds thereof, receive deposits of money, loan, invest and

collect the same, with interest, and may repay depositors with or without interest. No such corporation must loan money except on adequate security on real or personal property, unless such corporation has a paid up capital stock or Reserve Fund of not less than three hundred thousand dollars, and such loan is authorized by the articles of incorporation or by-laws, to be made by a two-third vote of the Directors; such loans must not be for a longer period than six years.

Stats. 1862, 199, Secs. 4, 5; 1864, 158, Sec. 2.

NORR.—It has been suggested that all after the word “property,” in the eighth line, should be stricken out, and there is force in the suggestion; but it is the law, and is retained and the suggestion submitted.

SEC. 572. When savings and loan corporations have a capital stock specified in their articles of incorporation, certificates of the ownership of shares may be issued; and the rights and privileges to be accorded to, and the obligations to be imposed upon, such capital stock, as distinct from those of depositors, must be fixed and defined, either in the articles of incorporation or in the by-laws.

Capital stock and rights and privileges thereof

Stats. 1862, 203, Sec. 17.

SEC. 573. The Directors of savings and loan corporations may, at such times and in such manner as the by-laws prescribe, declare and pay dividends of so much of the profits of the corporation, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose under the by-laws or under their agreements with depositors. The Directors must not contract any debt or liability against the corporation for any purpose whatever, except for deposits. The capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders.

No dividends, except from surplus profits.

To contract no liability, except for deposits.

Stats. 1870, 130, Sec. 1; 1862, 199, Sec. 10; 1862, 199, Sec. 22.

NORR.—It has been suggested that depositors and stockholders should be placed by the law on the same footing. We think there is wisdom in the distinction. A corporation which gives outside depositors a priority of security is enti-

tled to priority of confidence. All, however, may, if they choose, by their by-laws, obliterate this distinction. We think it well to allow the corporation to invite this superior confidence, or not, as they choose.

Property  
which may  
be owned by  
corpora-  
tions, and  
how disposed  
of.

**SEC. 574.** Savings and loan corporations may purchase, hold and convey real and personal property, as follows :

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars; except, on a vote of two-thirds of the stockholders, the corporation may increase the sum to an amount not exceeding two hundred and fifty thousand dollars.

2. Such as may have been mortgaged, pledged or conveyed to it in trust, for its benefit, in good faith, for money loaned in pursuance of the regular business of the corporation.

3. Such as may have been purchased at sales under pledges, mortgages or deeds of trust made for its benefit, or upon judgments or decrees obtained or rendered for money so loaned.

Restrictions  
in purchases  
as provided  
above.

4. No such corporation must purchase, hold or convey real estate in any other case or for any other purpose ; and all real estate described in Subds. 2 and 3 of this section must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise.

5. No corporation must purchase, own or sell personal property, except such as may be requisite for its immediate accommodation for the convenient transaction of its business, mortgages on real estate, bonds, securities or evidences of indebtedness, public or private, gold and silver bullion, and United States mint certificates of ascertained value, and evidences of debt issued by the United States.

6. No corporation must purchase, hold or convey bonds, securities or evidences of indebtedness, public or private, except bonds of the United States, of the State of California and of the counties, cities, or cities and counties, or towns of the State of California, unless such corporation has a capital stock or reserved fund, or both capital stock and reserved fund, paid in, of not less than three hundred thousand dollars.

Stats. 1862, 199, Sec. 13 ; 1864, 158, Sec. 3 ; 1865-6, 626 ;  
Sec. 1.

**SEC. 575.** Married women and minors may, in their own right, make and draw deposits, and draw dividends, and give valid receipts therefor.

Married women and minors may own stock in their own right.

Stats. 1862, 199, Secs. 14, 15; 1864, 158, Sec. 4; 1870, 132, Secs. 2, 3.

**NOTE.**—This provision is in "Domestic Relations" also.

**SEC. 576.** Savings and loan corporations may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the corporation. Payment thereafter made by the corporation to the depositor named in such certificate, or to his assignee named upon the books of the corporation, or, in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, discharges the corporation from all further liability on account of the money so paid.

May issue transferable certificates of deposit. Special certificates.

Stats. 1867-8, 459, Sec. 1.

**SEC. 577.** Savings and loan corporations may prescribe by their by-laws the time and conditions on which repayment is to be made to depositors, but whenever there is any call by depositors for repayment of a greater amount than the corporation may have disposable for that purpose, the Directors or officers thereof must not make any new loans or investments of the funds of the depositors, or of the earnings thereof, until such excess of call has ceased. The Directors of any such corporation having no capital stock must retain, on each dividend day, at least five per cent of the net profits of the corporation, to constitute a Reserve Fund, which must be invested in the same manner as other funds of the corporation, and must be used toward paying any losses which the corporation may sustain in pursuing its lawful business. The corporation may provide by its by-laws for the disposal of any excess in the Reserve Fund over one hundred thousand dollars, and the final disposal, upon the disso-

To provide Reserve Fund for the payment of losses.

lution of the corporation, of the Reserve Fund, or of the remainder thereof, after payment of losses.

Stats. 1862, 201, Sec. 11.

NOTE.—The Act of March 31st, 1870 (Stats. 1870, 523), and the Act of April 4th, 1870 (Stats. 1870, 822), are omitted. The corporations intended to be provided for therein can be formed under the law as here proposed, and thus the revised laws will be relieved from the embarrassments and complications which so many special provisions have induced.

Prohibition  
on Director  
and officer,  
and what  
vacates office

SEC. 578. No Director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loans to others, nor in any manner be an obligor for moneys borrowed of or loaned by such corporation. The office of any Director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant.

[New section.]

NOTE.—The last section is a suggestion from James De Fremery, of the San Francisco Savings Union, indorsed by Alexander Campbell, attorney at law, San Francisco. We are of the opinion that its adoption will meet with very general disfavor from the conductors of savings banks, but hope in this we may be agreeably disappointed. There is doubtless a class of persons engaged in the conduct of the business of such banks who would be glad to be protected against applications for personal favor. Law makers should be governed by a desire to give the greatest possible security to depositors, as a paramount object. Banks of savings are almost indispensable, and as far as possible they should prove to be what their name imports, and provide ample security for all deposits. It is with this view alone that we have added the amendment, and recommend its adoption, thereby placing beyond the officers even an inducement to lessen the security of innocent and oftentimes ignorant depositors.

## TITLE XI.

### MINING CORPORATIONS.

SECTION 584. Removal of the principal office provided for.

585. Directors to file certificates of proceedings in offices of County Clerks and Secretary of State.

586. Transfer agencies.

587. Stock issued at transfer agencies.

**SEC. 584.** Every mining corporation may change its office or principal place of business from one county or city to another, within this State. Before such removal is made, the consent in writing of the holders of two-thirds of the capital stock must be obtained and filed in the office of the corporation. When such consent is obtained, notice of the intended removal must be published for thirty days, in some newspaper published at or nearest the principal place of business of the corporation, giving the name of the county or city where the office is then situate, and that to which it is intended to remove it.

Removal of  
the principal  
office pro-  
vided for.

Stats. 1863-4, 76, Sec. 1.

**SEC. 585.** When the publication provided for in the preceding section has been completed, the Directors of the corporation must file in the offices of the Clerks of the counties from and to which such change has been made, and in the office of the Secretary of State, certified copies of the written consent of the stockholders to such change and of the notice of such change, and proof of publication; also, a certificate that the proposed removal has taken place; and thereafter the principal place of business of the corporation is at the place removed to.

Directors to  
file certifi-  
cates of pro-  
ceedings in  
offices of  
County  
Clerks and  
Secretary of  
State.

Stats. 1863-4, 76, Sec. 2.

**SEC. 586.** Any corporation organized in this State for the purpose of mining or carrying on mining operations in or without this State, may establish and maintain agencies in other States of the United States, for the transfer and issuing of their stock; and a transfer or issue of the same at any such transfer agency, in accordance with the provisions thereof, is valid and binding, as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this State. The agencies must be governed by the by-laws and the Directors of the corporation.

Transfer  
agencies.

Stats. 1863-4, 429, Secs. 1, 3.

**SEC. 587.** All stock of any such corporation, issued at a transfer agency, must be signed by the President and Secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency. No stock must be issued at a transfer agency

Stock issued  
at transfer  
agencies.

unless the certificate of stock, in lieu of which the same is issued, is at the time surrendered for cancellation.

Stats. 1863-4, 429, Sec. 2.

## TITLE XII.

### RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.

**SECTION 593.** Corporations for purposes other than profit, how formed.

594. Additional facts articles of incorporation to set out.

595. Corporation to hold property, and amount of real estate limited.

596. How much land Masons, Odd Fellows and Pioneers may hold.

597. Directors to make verified report annually.

598. Corporations to forfeit franchise and lands. Attorney-General to sue therefor.

599. Corporations may, by order of the District Court, sell or mortgage real estate, when. Petition. Summons or notice. Objections or answer. Trial, order or decree. Court may direct appraisement of property and disposition of proceeds.

600. What may be provided for in their by-laws, etc.

601. Members admitted after incorporation.

602. No member to transfer membership, etc.

Corporations for purposes other than profit, how formed.

**SEC. 593.** Any number of persons associated together for religious, social, benevolent or other purpose included in the subdivisions of Sec. 286, where pecuniary profit is not their object, may, in accordance with the rules, regulations or discipline of such association, elect for the first year Directors from among their members, the number thereof to be not less than five nor more than eleven, and may incorporate themselves as provided in this Part.

Stats. 1870, 46 ; 402, Sec. 1.

Additional facts articles of incorporation to set out.

**SEC. 594.** In addition to the requirements of Sec. 290, the articles of incorporation of any association mentioned in the preceding section must set forth the holding of the election for Directors, the time and place where the same was held, that a majority of the members of such association were present and voted at such election, and the result thereof; which facts must be verified by the officers conducting the election.

Stats. 1850, 347, Sec. 176 ; 1862, 125.



**SEC. 595.** All such corporations may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary whereon to erect buildings for the use of the association in conducting the business and objects thereof, for the convenient use of such buildings and providing burial grounds for the deceased members of such association—not to exceed six whole lots in any city or town nor more than twenty acres in the country; the annual increase or income whereof must not exceed fifty thousand dollars.

Corporation to hold property, and amount of real estate limited.

[New section.] Stats. 1850, 347, Sec. 182; 1862, 125.

**SEC. 596.** In addition to that provided for in the preceding section, Masons, Odd Fellows and Pioneer incorporated associations may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith. In case any such corporation is the owner, by donation or purchase, of more lands than herein or in the preceding section provided for, such surplus must be sold and conveyed by the corporation within five years after its acquisition. Such sale may be made without the order or decree of the District Court as hereinafter provided.

How much land Masons, Odd Fellows and Pioneers may hold.

Stats. 1862, 125; 1863, 34, 624.

**SEC. 597.** The Directors must annually make a full report of all property, real and personal, held in trust for their corporation by them, and of the condition thereof, to the members of the association for which they are acting; which report must be sworn to by the President and Secretary, and certified copies thereof filed in the offices where their original articles of incorporation are filed, accompanied by an affidavit that the corporation has not been engaged in any business or object other than that set forth in their original articles of incorporation.

Directors to make verified report annually.

Stats. 1850, 374, Sec. 183.

**SEC. 598.** Every corporation disobeying the provisions of the three preceding sections, forfeits its franchise, and all the lands held contrary to the provisions thereof be-

Corporations to forfeit franchise and lands.

Attorney-  
General to  
sue therefor.

come the property of the State. Whenever information is given to him, by any citizen of this State, that a corporation has violated any of the provisions of the three preceding sections, the Attorney-General must institute proceedings, in the proper District Court, for the forfeiture of the franchise and the recovery of such lands for the use of the State.

[New section.]

Corporations  
may, by  
order of the  
District  
Court, sell  
or mortgage  
real estate,  
when.

SEC. 599. Corporations organized by members of associations mentioned in Sec. 593 may mortgage or sell the necessary real estate held by them, on complying with the following provisions:

1. The Directors must, by order, declare such disposition of the real estate necessary, or for the best interests of the corporation, in the prosecution of the purposes of the association, setting forth the grounds for the same.

Petition.

2. The Directors must petition the District Court of the county in which the real estate is situate, for the sale thereof, setting forth the order and the grounds upon which the same is asked.

Summons or  
notice.

3. The Judge of the Court, if it appear *prima facie* a case wherein such order should be made, must direct publication of summons to all persons interested in the property to appear before the Court and show cause why such order or decree should not be made. The notice must be published in a weekly newspaper published in the city or county where the property is situate, for one month at least; the last publication thereof to be at least ten days prior to the day set for the hearing of the petition; in lieu of the publication, personal notice may be served on all persons interested in the real estate. In either case, proof of publication or service to be satisfactorily shown as in other cases in the District Court.

Objections  
or answer.

4. At any time before the day set for hearing the petition, any person interested in the property may present objections or answer to the petition, raising either question of law or fact, and the same must be tried by the Court as other cases are tried.

Trial, order  
or decree.

5. If, on the hearing at the trial, it is found by the Court that the mortgage or sale of the property is unnecessary, or that the purposes of the association will not be subserved, advanced or benefited thereby, the order and

decree must be denied; if it be found necessary, or that the purpose of the association will be subserved, advanced or benefited thereby, the petition must be granted.

6. The Court may, if considered necessary, direct an appraisal of the property to be first made, and appoint disinterested appraisers therefor, fix their compensation and time for report; and direct the making and execution of the mortgage or deed and all necessary accompanying notes, bonds or contracts, and to what purpose the proceeds must, by the corporation, be applied, as best comports with the object of the association.

Court may direct appraisal of property and disposition of proceeds.

Stats. 1850, 347, Sec. 179; 1859, 87, Sec. 1.

**Sec. 600.** Corporations organized for purposes other than for profit may, in their by-laws, ordinances, constitutions or articles of incorporation, make the following provisions, in addition to those provided for in Tit. I of this Part.

What may be provided for in their by-laws, etc.

1. Qualifications of, mode of election and terms of admission to, membership.

2. Fix the fees of admission and dues to be paid to their treasury by members.

3. Provide for the expulsion and suspension of members for misconduct or non-payment of dues; also, for restoration to membership.

4. Such other regulations, not repugnant to the Constitution or laws of the State, as are consonant with the objects of the corporation.

Stats. 1863, 624, Secs. 8, 9.

**Sec. 601.** Members admitted after incorporation have all the rights and privileges, and are subject to the same responsibilities, as members of the association prior thereto.

Members admitted after incorporation.

Stats. 1863, 624, Sec. 7.

**Sec. 602.** No member or his legal representative must dispose of or transfer any right or privilege conferred on him by reason of his membership of such corporation, or be deprived thereof, except as herein provided.

No member to transfer membership, etc.

[New section.]

## TITLE XIII.

## CEMETERY CORPORATIONS.

**SECTION 608.** How much land may be held, and how disposed of.

**609.** Who are members eligible to vote and hold office.

**610.** May hold personal property, to what amount. How disposed of.

**611.** May issue bonds to pay for grounds. Proceeds of sales, how disposed of.

**612.** May take and hold property or use income thereof, how.

**613.** Interments in lot, and effect thereof. Transfer of rights only made, how.

**614.** Lot owners previous to purchase, to be members of the corporation.

How much land may be held, and how disposed of.

**SEC. 608.** Corporations organized to acquire lands for and to maintain cemeteries may take, by purchase, donation or devise, not exceeding three hundred and twenty acres of land, in the county wherein their articles of incorporation are filed, to be held and occupied exclusively for a cemetery for the burial of the dead; which must be surveyed and subdivided into lots or plats, avenues and walks, under order of the Directors, and a map thereof filed in the office of the Recorder of the county wherein the lands are situate; thereafter, upon such terms and subject to such conditions and restrictions, to be inserted in the conveyances, as the by-laws or Directors may prescribe, the Directors may sell and convey the lots or plats to purchasers. All conveyances to be executed under the seal of the corporation, signed by the President and Secretary.

Stats. 1859, 281, Sec. 4.

Who are members eligible to vote and hold office.

**SEC. 609.** Every person of full age who is proprietor of a lot or plat in the cemetery of the corporation, containing not less than two hundred square feet of land, or, if there be more than one proprietor of any such lot, then such of the proprietors as the majority of joint proprietors designate, may, in person or by proxy, cast one vote at all elections had by the corporation for Directors or any other purpose, and is eligible to any office of the corporation. At each annual meeting or election, the Directors must make a report to the proprietors of al

their doings, management and condition of the property and concerns of the corporation.

Stats. 1859, 281, Sec. 5.

**SEC. 610.** Such corporations may hold personal property to an amount not exceeding five thousand dollars, in addition to the surplus remaining from the sales of lots or plats after payments of all bonds issued for the purchase of cemetery lands and interest thereon. Such surplus must be disposed of in the following manner :

May hold personal property, to what amount

1. In the improvement, embellishment and preservation of the cemetery, and paying incidental expenses of the corporation.

How disposed of.

2. By relieving the distressed members of the corporation and others, and for other charitable purposes.

3. By donating it to any board of relief established by such corporations.

Stats. 1859, 281, Sec. 4 ; 1864, 12, Sec. 1.

**SEC. 611.** Such corporations may issue the bonds thereof, bearing interest not exceeding twelve per cent. per annum, for the purchase of lands for their cemeteries, to the payment of which at least sixty per cent. of the proceeds of sales of lots and plats, or other proceeds of the corporation, must be applied every three months, until the bonds and interest thereon are fully paid, the residue or surplus of such proceeds to be used and disposed of as provided in the preceding section.

May issue bonds to pay for grounds.

Proceeds of sales, how disposed of.

Stats. 1859, 281, Sec. 7 ; 1864, 12, Sec. 1.

**SEC. 612.** Cemetery corporations may take and hold any property, or use the income thereof, bequeathed, donated or given in trust to them for the specific purpose of embellishing or improving the grounds, avenues or superstructures of their cemeteries, or for the erection, preservation or repair of monuments therein, or for any other purpose or design consistent with the objects of the corporation.

May take and hold property or use income thereof, how.

Stats. 1859, 281, Sec. 9.

**SEC. 613.** Whenever an interment is made in any lot or plat transferred to individual owners by the corporation, the same thereby becomes forever inalienable, and descends in regular line of succession to the heirs at law

Interments in lot, and effect thereof

Transfer of  
right only  
made, how.

of the owner. When there are several owners of interests in such lot or plat, one or more may acquire by purchase the interest of others interested in the fee simple title thereof; but no one not an owner acquires interest or right of burial therein by purchase; nor must any one be buried in any such lot or plat, not at the time owning an interest therein, or who is not the relative of such owner or of his wife, except by consent of all jointly interested.

Stats. 1859, 281, Sec. 11.

Lot owners  
previous to  
purchase, to  
be members  
of the corpo-  
ration.

SEC. 614. When grounds purchased or otherwise acquired for cemetery purposes has been previously used as a burial ground, those who are lot owners at the time of the purchase are entitled to continue to own the same, and are members of the corporation, with all the privileges a purchase of a lot from the corporation could confer.

Stats. 1859, 281, Sec. 12.

## TITLE XIV.

### AGRICULTURAL FAIR CORPORATIONS.

SECTION 620. May acquire and hold real estate, how much.

621. Shall not contract debts or liabilities exceeding amount in treasury.

622. Not for profit. May fix fee, etc., for membership.

May acquire  
and hold  
real estate,  
how much.

SEC. 620. Agricultural fair corporations may purchase, hold or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon, and may sell, lease or otherwise dispose of the same, at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactures, stock raising and general domestic industry.

Stats. 1859, 104, Sec. 2.

Shall not  
contract  
debts or  
liabilities  
exceeding  
amount in  
treasury.

SEC. 621. Neither the members of the agricultural fair corporation, nor the Directors thereof, shall contract any debts or liabilities in excess of the amount of money in

the treasury at the time such debt or liability is being contracted; but for the purpose of paying for real estate, they may create debts and liabilities not exceeding five thousand dollars, secured by mortgage on the property of the corporation. The parties contracting any debt or liability in excess of that by this section authorized, are personally liable therefor.

Stats. 1859, 104, Sec. 5.

**SEC. 622.** Agricultural fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with the term of membership and mode of acquiring the same, must be provided for in their articles of incorporation or by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for real estate, improvements thereon, and to defray the current expenses of fairs.

Not for profit

May fix fee,  
etc., for  
membership

Stats. 1859, 104, Sec. 4.

## TITLE XV.

### GAS CORPORATIONS.

**SECTION 628.** Corporations to obtain privilege from city or town, and use meters proved by the inspector.

**629.** Gas to be supplied on written application. Damages for refusal.

**630.** When corporations may refuse to supply gas.

**631.** Portions of supply pipes to be laid by the corporation and by applicant.

**632.** Agent of corporation may inspect meters.

**633.** When persons neglect to pay, gas may be shut off.

**SEC. 628.** No corporation must supply any city or town with gas, or lay down mains or pipes for that purpose in the streets or alleys thereof, without permission from the city or town authorities. Nor must such corporation furnish or use any gas meter which has not been proved and sealed by the inspector of gas meters.

Corporations  
to obtain  
privilege  
from city or  
town, and  
use meters  
proved by  
the inspector

Stats. 1863, 647, Sec. 3.

Gas to be  
supplied on  
written ap-  
plication.

Damages for  
refusal.

SEC. 629. On written application, and payment of dues for gas from the owner or occupant thereof, every gas corporation must furnish any building or premises prepared with pipes to receive the same, at no greater distance than one hundred feet from a main, all gas required for lighting such building or premises. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas as required, the owner or occupant may recover from the corporation the sum of fifty dollars, and for every day such refusal or neglect continues thereafter, the further sum of five dollars as ascertained damages.

Stats. 1863, 647, Sec. 3.

When corpo-  
rations may  
refuse to  
supply gas.

SEC. 630. Gas corporations are not required to furnish for or affix to buildings or premises pipes and fittings, except on contract, nor must the owner or occupant applying for gas be refused on the ground that a former owner or occupant is in arrears for gas, unless he has agreed with such former owner or occupant to pay the same and refuses or neglects to do so. No corporation is required to lay service pipe where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance with the corporation, a sum of money sufficient to pay the cost of laying the pipes and fittings and fixtures for using gas on the premises and in the building to be supplied.

Stats. 1863, 647, Sec. 5.

Portions of  
supply pipes  
to be laid by  
the corpora-  
tion and by  
applicant.

SEC. 631. All gas corporations must lay supply pipes connecting any building or premises with the main, for a distance of one hundred feet, if so far distant, at the expense of the corporation. The applicant for gas must lay the pipe from the end of the one hundred feet to such portions of the buildings or premises as desired, at his own expense.

[New section.]

Agent of  
corporation  
may inspect  
meters.

SEC. 632. Any agent of a gas corporation exhibiting written authority, signed by the President or Secretary thereof for such purpose, may enter any building or premises lighted with gas supplied by such corporation to inspect the gas meters therein, to ascertain the quantity of gas supplied or consumed. Every owner or occu-



part of such buildings who hinders or prevents such entry or inspection must pay to the corporation the sum of fifty dollars as ascertained damages.

Stats. 1863, 647, Sec. 6.

Sec. 633. All gas corporations may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied, or the rent for any meter, pipes or fittings provided by the corporation as required by his contract; and for the purpose of shutting off the gas in such case, any employé of the corporation may enter the building or premises of such person, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of any day, and remove therefrom any property of the corporation used in supplying gas.

When persons neglect to pay, gas may be shut off.

Stats. 1863, 647, Sec. 7.

## TITLE XVI.

### LAND AND BUILDING CORPORATIONS.

Section 639. How organized.

640. May borrow money.

641. Powers and object of the corporation.

642. May insure the lives of members and debtors.

643. What real estate may be owned at any one time.

644. What the by-laws may provide.

645. Secretary must make annual statement, and publish same.

646. Liability of shareholders for debts.

647. Consolidation and transfer of corporation business and property.

648. Married women and minors.

Sec. 639. Corporations organized under Subd. 11 of Sec. 286, may raise funds in shares not exceeding two hundred dollars each, payable in periodical instalments, to enable any member to receive therefrom an advance of his shares, upon security by mortgage or other conveyance of real estate. Such bodies are known as land and building corporations, and may be organized with or without a capital stock.

How organized.

Stats. 1861, 567, Sec. 1.

Sec. 640. Any such corporation may borrow money for the purpose of carrying out its objects, and may give

May borrow money.

as security therefor its shares or mortgage upon its real estate.

Stats. 1861, 567, Sec. 5 ; 1869-70, 474, Sec. 1.

Powers and  
object of the  
corporation.

SEC. 641. Any such corporation may purchase real estate and erect buildings for its members, and make loans or advances to its members for the purpose of aiding them in acquiring real estate, making improvements thereon and removing encumbrances therefrom; such corporation to be secured therefor in manner provided in the preceding section, until the amount or value of the shares so loaned or advanced are fully repaid to such corporation, with the interest thereon, and all fines or other payments incurred in respect thereof.

Stats. 1861, 567, Secs. 5-18.

May insure  
the lives of  
members  
and debtors.

SEC. 642. Such corporation may insure, in some life insurance company incorporated under the laws of this State, the lives of its members and debtors, for the benefit of the corporation and of the families or legal representatives of such decedent shareholders.

[New section.]

What real  
estate may  
be owned at  
any one time

SEC. 643. Any such corporation may purchase, hold and convey real estate, as follows :

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars.

2. Such as may from time to time be necessary to supply the wants of its members, the cost of which, held unallotted to the members thereof at any one time, must not exceed the sum of one hundred thousand dollars.

3. Such as shall have been mortgaged, pledged or conveyed to it in trust, for its benefit, for money advanced, or to secure the purchase price thereof in pursuance of the regular business of the corporation.

Stats. 1862, 199 ; "Savings and Loan Corporations," Sec. 184.

What the  
by-laws may  
provide.

SEC. 644. The by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member to the funds thereof; the time and manner in which such payments are to be made; the fines and forfeiture for default; the time and manner of election of Directors and other officers, and

their terms of office; the manner in which the real estate may be distributed, allotted or sold to its members; the terms and conditions upon which advances may be made to its members and by them repaid to the corporation; the manner in which a person may become and cease to be a member; the conditions on which members may withdraw from the corporation, and provide for the payment to withdrawing members of the sums of money due to them arising from subscriptions or payments to the funds thereof, and the proportion of profits such withdrawing members may receive on withdrawal; but no member can withdraw from the corporation within twelve months from the date of becoming a member.

Stats. 1861, 567, Sec. 2; 1861, 567, Sec. 19; 1867-8, 539, Sec. 1.

**SEC. 645.** The Secretary of any such corporation must, once in each year during the existence of the corporation, prepare a full and explicit statement of the financial affairs thereof, comprising a balance sheet, statements of receipts and expenditures, profit and loss, and assets and liabilities, which must be audited and verified by two competent persons (not Directors), elected by the general body of shareholders, and be countersigned by the President and Secretary. A copy of such statement must be printed and circulated among the members, and published for one week immediately after the annual general meeting of the corporation, in one or more newspapers published daily, or four weeks in one or more newspapers published weekly, in the town or city where the principal office is located.

Secretary must make annual statement, and publish same.

Stats. 1861, 567, Sec. 9.

**SEC. 646.** Every present and past member of such corporation is personally liable for such proportion of all its debts and liabilities as the number of shares subscribed by him bears to the whole number of subscribed shares; but no past member is liable for such contribution if more than one year has elapsed since he ceased to be a member before suit is commenced, nor for any debt or liability contracted after the time at which he ceased to be a member, nor unless it appears to the Court that the existing members are unable to satisfy such debts and liabilities; nor must any contribution be required from

Liability of shareholders for debts.

any member or past member, exceeding the amount unpaid on the shares in respect of which he is liable.

Stats. 1861, 567, Sec. 10.

Consolidation and transfer of corporation business and property.

**SEC. 647.** Any two or more such corporations may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporation or either of them; or any such corporation may transfer its engagements, funds and property to any other such corporation, upon such terms as may be agreed upon by two-thirds of the members of each of such bodies present at general meetings of the members, convened for the purpose, by notice stating the object of the meeting, sent through the Post-office to every member, and by general notice, published in some daily newspaper at least one week, or weekly newspaper at least two weeks, published at the place where the principal business of the corporations is carried on; but no such transfer shall prejudice any right of any creditor of the corporation transferring.

**NOTE.**—Copy of a bill pending in the English Parliament.

Married women and minors.

**SEC. 648.** Married women and minors may be admitted as members and may take and hold shares in such corporations, and may execute all necessary instruments and give all necessary acquittances, and sell and transfer their shares, in like manner as other members.

Stats. 1861, 567, Sec. 6.

**NOTE.**—The last Title of this Part was prepared and presented to us by Mr. H. B. Congdon, of the San Francisco Co-operative Land and Building Association, after the subject of "Corporations" had been prepared; printed once, and resubmitted with amendments for a final printing. We had not the time to give this particular subject the attention its importance demands, and therefore report it for consideration without recommendation.

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#### NOTE.

The latest legislation declaring and defining the objects and purposes for which corporations might be formed, as well as providing for their government, made them subject alone to the few crude provisions of the several Acts, and expressly declared that such corporations should not be subject to the general laws upon the subject. This is calculated to awaken the minds of all to a growing evil alluded to at some length in note to Sec. 286. We give

below the title and first sections of two Acts passed at the session of 1869-70, to show how indeterminate are the objects and purposes for which corporations were authorized to be formed, viz :

*An Act to provide for the formation of corporations for the accumulation of funds and earnings, and the direct promotion of manufacturing and mechanic arts, agriculture and mining.*

"SECTION 1. Corporations for the purpose of aggregating the funds and savings of the members thereof and others, and preserving and investing the same for their common benefit, so as to directly promote the establishment and increase of manufacturing and mechanical industry, mining and agriculture, in the State of California, may be formed according to the provisions of this Act; and such corporations, and the members and stockholders thereof, shall be subject to all the conditions and liabilities herein imposed, and none other." (Stats. 1869-70, 523.)

This Act, having a very indefinite object expressed in its title, seems to have been intended to allow all corporations which may, by possible construction, be included in its title, to loan money; and provides a scale of preferences in making their loans. This will be apparent on examining the Act.

*An Act to provide for the formation of corporations for certain purposes.*

"SECTION 1. Corporations for any trading, manufacturing, mechanical, or other lawful business or purpose, may be formed under the provisions of this Act; such corporations and its members to be subject to the duties, conditions and liabilities herein imposed, and no others." (Stats. 1869-70, 822.)

If the Act of 1853, as amended in 1854, commented on in the case of *Vandall vs. South San Francisco Dock and Wharf Company*, is obnoxious to the objection of the learned Judge rendering the decision, then how much more objectionable are these two Acts. The provisions of these two Acts are not retained further than some of the restrictive features.

Scarcely a section of Part IV is in the exact language of the original. All have been condensed and made to conform to the decisions of the Supreme Court; and when possible, one has been made to perform the office of many. References are complete to all statutes from which sections are drawn, and it will be observed that they are numerous. The main features of our present statutes applicable to special corporations have been retained; some of minor importance are omitted as unnecessary. Tit. I is applicable to all corporations, and contains ample provisions for their organization and government. All special provisions are contained in the succeeding Titles. There are seventy-two pages of Hittell's closely printed work devoted to the subject of corporations; besides, the Statutes of 1865-6, 1867-8 and 1869-70 contain about forty pages more on this subject, all of which are condensed and so refined that, if printed in the same manner, this work would not occupy more than one-third the space.

When reference is made to the page of a statute, giving its date, it is more frequently the one containing the title of the Act; but sometimes it is the page on which the section is found.



## DIVISION SECOND.

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**PART I. PROPERTY IN GENERAL.**

**II. REAL OR IMMOVABLE PROPERTY.**

**III. PERSONAL OR MOVABLE PROPERTY.**

**IV. ACQUISITION OF PROPERTY.**





# PART I.

## PROPERTY IN GENERAL.

### TITLE I. NATURE OF PROPERTY.

#### II. OWNERSHIP.

#### III. GENERAL DEFINITIONS.

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## TITLE I.

### NATURE OF PROPERTY.

#### SECTION 654. Property, what.

655. In what property may exist.

656. Wild animals.

657. Real and personal.

658. Real property.

659. Land.

660. Fixtures.

661. Appurtenances.

662. Property in mines.

663. Personal property.

SEC. 654. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

Property,  
what.

N. Y. C. C., Sec. 159.

SEC. 655. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, the good will of a business, trade marks and signs, and of rights created or granted by statute.

In what  
property  
may exist.

N. Y. C. C., Sec. 160.

SEC. 656. Animals wild by nature are the subjects of ownership while living only when on the land of the per-

Wild  
animals.

son claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

N. Y. C. C., Sec. 161.

Real and  
personal.

SEC. 657. Property is either—

1. Real or immovable; or,
2. Personal or movable.

N. Y. C. C., Sec. 162.

Real  
property.

SEC. 658. Real or immovable property consists of—

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. Mines and mining claims.

N. Y. C. C., Sec. 163.

NOTE.—Subd. 4 is new.

Land.

SEC. 659. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

N. Y. C. C., Sec. 164.

Fixtures.

SEC. 660. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of nails, bolts or screws.

N. Y. C. C., Sec. 165.

NOTE.—By California and Nevada decisions this rule has been a little modified, so as to make the question of fixtures depend somewhat upon the intent or purposes of the party in erecting buildings for temporary use. It is thought best, however, to preserve the common law rules in terms as contained in this section.

Appurte-  
nances.

SEC. 661. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air or heat from or across the land of another.

N. Y. C. C., Sec. 166.

**SEC. 662.** Property in mines is real property, whether held by letters patent, transfer, occupancy or under mining rules and customs. Property in mines.

[New section.]      Stats. 1860, 175.

**SEC. 663.** Every kind of property that is not real is personal. Personal property.

N. Y. C. C., Sec. 167.

## TITLE II.

### OWNERSHIP.

#### CHAPTER I. OWNERS.

##### II. MODIFICATIONS OF OWNERSHIP.

##### III. RIGHTS OF OWNERS.

##### IV. TERMINATION OF OWNERSHIP.

### CHAPTER I.

#### OWNERS.

##### SECTION 669. Owner.

670. Property of the State. .

671. Who may own property.

672. Aliens inheriting, must claim within five years.

**SEC. 669.** All property has an owner, whether that owner is the State, and the property public, or the owner an individual, and the property private. The State may also hold property as a private proprietor. Owner.

N. Y. C. C., Sec. 168.

**SEC. 670.** The State is the owner of all land below high water mark bordering upon tide water; of all land below the water of a lake or stream which constitutes an exterior boundary of the State; of all property lawfully appropriated by it to its own use; of all property dedicated to the State, and of all property of which there is no other owner. Property of the State.

N. Y. C. C., Sec. 169.

Who may  
own prop-  
erty.

**SEC. 671.** Any person, whether citizen or alien, may take and hold property, real or personal.

N. Y. C. C., Sec. 170 ; Const., Art. I, Sec. 17 ; *Ramaratz vs. Kent*, 2 Cal., 558 ; *Attorney-General vs. Folsom*, 5 Cal., 373 ; *Sumssen vs. Bofer*, 6 Cal., 250 ; *Norris vs. Hoyt*, 18 Cal., 217 ; *Farrell vs. Enright*, 12 Cal., 450 ; *State of California vs. Rogers*, 13 Cal., 159.

Aliens in-  
heriting,  
must claim  
within five  
years.

**SEC. 672.** If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Tit. VIII, Part III, CODE OF CIVIL PROCEDURE.

*Stats.* 1856, 137 ; *People vs. Rogers*, 13 Cal., 159.

## CHAPTER II.

### MODIFICATIONS OF OWNERSHIP.

#### ARTICLE I. INTERESTS IN PROPERTY.

##### II. CONDITIONS OF OWNERSHIP.

##### III. RESTRAINTS UPON ALIENATION.

##### IV. ACCUMULATIONS.

#### ARTICLE I.

##### INTERESTS IN PROPERTY.

#### SECTION 678. Ownership, absolute or qualified.

- 679. When absolute.
- 680. When qualified.
- 681. Several ownership, what.
- 682. Ownership of several persons.
- 683. Joint interest, what.
- 684. Partnership interest, what.
- 685. Interest in common, what.
- 686. What interests are in common.
- 687. Community property.
- 688. Interests as to time.
- 689. Present interest, what.
- 690. Future interest, what.
- 691. Perpetual interest, what.
- 692. Limited interest, what.
- 693. Kinds of future interests.
- 694. Vested interests.
- 695. Contingent interests.

**SECTION 696.** Two or more future interests.

697. Certain future interests not to be void.

698. Posthumous children.

699. Qualities of expectant estates.

700. Same.

701. Interests in real property.

702. Same.

703. What future interests are recognized.

**SEC. 678.** The ownership of property is either —

1. Absolute; or,
2. Qualified.

Ownership,  
absolute or  
qualified.

N. Y. C. C., Sec. 171.

**SEC. 679.** The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

When  
absolute.

Thus the use of gunpowder is restricted by general laws, but its ownership may nevertheless be justly called absolute.

N. Y. C. C., Sec. 172.

**SEC. 680.** The ownership of property is qualified—

1. When it is shared with one or more persons.
2. When the time of enjoyment is deferred or limited.
3. When the use is restricted.

When  
qualified.

N. Y. C. C., Sec. 173.

**SEC. 681.** The ownership of property by a single person is designated as a sole or several ownership.

Several  
ownership,  
what.

N. Y. C. C., Sec. 174.

**SEC. 682.** The ownership of property by several persons is either—

1. Of joint interests.
2. Of partnership interests.
3. Of interests in common.
4. Of community interest of husband and wife.

Ownership  
of several  
persons.

N. Y. C. C., Sec. 175.

**SEC. 683.** A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer which confers a right of survivorship.

Joint  
interest,  
what.

This provision is intended to confine the right of survivorship to cases in which its creation was clearly intended.

N. Y. C. C., Sec. 176; Stats. 1855, 171, Sec. 1; Dewey vs. Lambier, 7 Cal., 347; Bowen vs. May, 12 Cal., 351.

Partnership  
interest,  
what.

SEC. 684. A partnership interest is one owned by several persons, in partnership, for partnership purposes.

N. Y. C. C., Sec. 177.

Interest in  
common,  
what.

SEC. 685. An interest in common is one owned by several persons, not in joint ownership or partnership.

N. Y. C. C., Sec. 178.

What  
interests are  
in common.

SEC. 686. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation, expressly or by necessary implication, to be a joint interest, with a right of survivorship, or unless acquired as community property.

N. Y. C. C., Sec. 179; Stats. 1855, 171, Sec. 1.

Community  
property.

SEC. 687. Community property is property acquired by husband and wife, or either, after marriage, when not acquired as the separate property of either or as common or joint property of both.

[New section.] Civil Code of Louisiana, 370, Art. 237.

NOTE.—The community property consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, or the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

Interests as  
to time.

SEC. 688. In respect to the time of enjoyment, an interest in property is either—

1. Present or future; and,
2. Perpetual or limited.

N. Y. C. C., Sec. 180.

Present  
interest,  
what.

SEC. 689. A present interest entitles the owner to the immediate possession of the property.

N. Y. C. C., Sec. 181.

Future  
interest,  
what.

SEC. 690. A future interest entitles the owner to the possession of the property only at a future period.

N. Y. C. C., Sec. 182.

**Sec. 691.** A perpetual interest has a duration equal to that of the property.

N. Y. C. C., Sec. 183.

Perpetual  
interest,  
what.

**Sec. 692.** A limited interest has a duration less than that of the property.

N. Y. C. C., Sec. 184.

Limited  
interest,  
what.

**Sec. 693.** A future interest is either—

1. Vested; or,
2. Contingent.

N. Y. C. C., Sec. 185.

Kinds of  
future  
interests.

**Sec. 694.** A future interest is vested, when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

N. Y. C. C., Sec. 186.

Vested  
interests.

**Sec. 695.** A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect, remains uncertain.

N. Y. C. C., Sec. 187.

Contingent  
interests.

**Sec. 696.** Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

N. Y. C. C., Sec. 188.

Two or more  
future  
interests.

**Sec. 697.** A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

N. Y. C. C., Sec. 189.

Certain  
future  
interests not  
to be void.

**Sec. 698.** When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

N. Y. C. C., Sec. 190; Stats. 1855, 171, Sec. 5.

Posthumous  
children.

**Sec. 699.** Future interests pass by succession, will and transfer, in the same manner as present interests.

N. Y. C. C., Sec. 191.

Qualities of  
expectant  
estates.

Same.

**SEC. 700.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

N. Y. C. C., Sec. 192.

Interests  
in real  
property.

**SEC. 701.** In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in Part II of this Division.

N. Y. C. C., Sec. 193.

Same.

**SEC. 702.** The names and classification of interests in real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

N. Y. C. C., Sec. 194.

What future  
interests are  
recognized.

**SEC. 703.** No future interest in property is recognized by the law, except such as is defined in this Division of the Code.

N. Y. C. C., Sec. 195.

## ARTICLE II.

### CONDITIONS OF OWNERSHIP.

**SECTION 707.** Fixing the time of enjoyment.

708. Conditions.

709. Certain conditions precedent, void.

710. Conditions restraining marriage, void.

711. Conditions restraining alienation, void.

Fixing the  
time of  
enjoyment.

**SEC. 707.** The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case the enjoyment is said to be upon condition.

N. Y. C. C., Sec. 196.

Conditions.

**SEC. 708.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right.

N. Y. C. C., Sec. 197.

Certain con-  
ditions pre-  
cedent, void.

**SEC. 709.** If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself,



but otherwise unlawful, the instrument takes effect and the condition is void.

N. Y. C. C., Sec. 198.

SEC. 710. Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void; but this does not affect limitations where the intent was not to forbid marriage but only to give the use until marriage.

Conditions  
restraining  
marriage,  
void.

N. Y. C. C., Sec. 199.

SEC. 711. Conditions restraining alienation, when repugnant to the interest created, are void.

Conditions  
restraining  
alienation,  
void.

N. Y. C. C., Sec. 200.

### ARTICLE III.

#### RESTRAINTS UPON ALIENATION.

SECTION 715. How long it may be suspended.

716. Future interests void, which suspend power of alienation.

717. Leases of agricultural land, for over ten years, void.

718. Leases of city lots, for over twenty years, void.

SEC. 715. The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the limitation or condition, except in the single case mentioned in Sec. 772.

How long it  
may be  
suspended.

N. Y. C. C., Sec. 201.

SEC. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Future  
interests  
void, which  
suspend  
power of  
alienation.

N. Y. C. C., Sec. 202.

SEC. 717. No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid.

Leases of  
agricultural  
land, for  
over ten  
years, void.

Stats. 1851, 169, Sec. 1; N. Y. C. C., Sec. 203.

Leases of city  
lots, for over  
twenty  
years, void.

SEC. 718. No lease or grant of any town or city lot, for a longer period than twenty years, in which shall be reserved any rent or service of any kind, shall be valid.

Stats. 1851, 169, Sec. 1; N. Y. C. C., Sec. 203.

#### ARTICLE IV.

##### ACCUMULATIONS.

SECTION 722. Dispositions of income.

723. Accumulations, when void.

724. Accumulation of income.

725. Other directions, when void in part.

726. Application of income to support, etc., of minor.

Dispositions  
of income.

SEC. 722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this Title in relation to future interests.

N. Y. C. C., Sec. 204.

Accumula-  
tions, when  
void.

SEC. 723. All directions for the accumulation of the income of property, except such as are allowed by this Title, are void.

N. Y. C. C., Sec. 205.

Accumula-  
tion of in-  
come.

SEC. 724. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing, sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this Title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.

N. Y. C. C., Sec. 206.

Other direc-  
tions, when  
void in part.

SEC. 725. If, in either of the cases mentioned in the last section, the direction for an accumulation is for a

longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

N. Y. C. C., Sec. 207.

SEC. 726. When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper Court, upon application, may direct a suitable sum to be applied thereto out of the fund.

Application of income to support, etc., of minor.

N. Y. C. C., Sec. 208.

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### CHAPTER III.

#### RIGHTS OF OWNERS.

SECTION 732. Increase of property.

733. In certain cases who entitled to income of property.

SEC. 732. The owner of a thing owns also all its products and accessions.

Increase of property.

N. Y. C. C., Sec. 209.

SEC. 733. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership, during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

In certain cases who entitled to income of property.

N. Y. C. C., Sec. 210.

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### CHAPTER IV.

#### TERMINATION OF OWNERSHIP.

SECTION 739. Future interests, when defeated.

740. Same.

741. Future interests, when not defeated.

742. Same.

Future in-  
terests, when  
defeated.

SEC. 739. A future interest, depending on the contingency of the death of any person without successors, heirs, issue or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

N. Y. C. C., Sec. 211; Stats. 1855, 171, Sec. 4.

Same.

SEC. 740. A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

N. Y. C. C., Sec. 212.

Future in-  
terests, when  
not defeated.

SEC. 741. No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

N. Y. C. C., Sec. 213.

Same.

SEC. 742. No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

N. Y. C. C., Sec. 214.

## TITLE III.

### GENERAL DEFINITIONS.

SECTION 743. Income, what.

749. Time of creation, what.

Income,  
what.

SEC. 748. The income of property, as the term is used in this Part of the Code, includes the rents and profits of

**real property, the interest of money, dividends upon stock and other produce of personal property.**

N. Y. C. C., Sec. 215.

**SEC. 749.** The delivery of the grant, where a limitation, condition or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition or interest, within the meaning of this Part of the Code.

Time of creation, what.

N. Y. C. C., Sec. 216.



# PART II.

## REAL OR IMMOVABLE PROPERTY.

### TITLE I. GENERAL PROVISIONS.

#### II. ESTATES IN REAL PROPERTY.

#### III. RIGHTS AND OBLIGATIONS OF OWNERS.

#### IV. USES AND TRUSTS.

#### V. POWERS.

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## TITLE I.

### GENERAL PROVISIONS.

SECTION 755. Real property, how governed.

SEC. 755. Real property within this State is governed by the law of this State.

N. Y. C. C., Sec. 217.

Real prop-  
erty, how  
governed.

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## TITLE II.

### ESTATES IN REAL PROPERTY.

#### CHAPTER I. ESTATES IN GENERAL.

#### II. TERMINATION OF ESTATES.

#### III. SERVITUDES.

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### CHAPTER I.

#### ESTATES IN GENERAL.

SECTION 761. Enumeration of estates.

762. What estate a fee simple.

763. Conditional fees and estates tail abolished.

## SECTION 764. Certain remainders valid.

- 765. Freeholds. Chattels real. Chattel interests.
- 766. Estates for life of a third person, when a freehold, etc.
- 767. Future estates, what.
- 768. Reversions.
- 769. Remainders.
- 770. Limitations of chattels real.
- 771. Suspension by trust.
- 772. Contingent remainder in fee.
- 773. Remainders, future and contingent estates, how created.
- 774. Limitation of successive estates for life.
- 775. Remainder upon estates for life of third person.
- 776. Same.
- 777. Contingent remainder on a term of years.
- 778. Remainder of estates for life.
- 779. Remainder upon a contingency.
- 780. Heirs of a tenant for life, when to take as purchasers.
- 781. Construction of certain remainders.
- 782. Effect of power of appointment.

Enumeration  
of  
estates.

SEC. 761. Estates in real property, in respect to the duration of their enjoyment, are either—

1. Estates of inheritance or perpetual estates.
2. Estates for life.
3. Estates for years; or,
4. Estates at will.

N. Y. C. C., Sec. 218.

What estate  
a fee simple.

SEC. 762. Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

N. Y. C. C., Sec. 219.

Conditional  
fees and  
estates tail  
abolished.

SEC. 763. Conditional fees at Common Law and estates tail under the statute *de donis* are abolished; and every estate which would be adjudged a conditional fee at Common Law, or a fee tail by the statute *de donis*, is a fee simple; and, if no valid remainder is limited thereon, is a fee simple absolute.

N. Y. C. C., Sec. 220.

NOTE.—The words “conditional fees at Common Law” and “fee tail by the statute *de donis*” are substituted for the words “fee tail, according to the law of this State as it existed on the 12th day of July, 1782,” in the New York Civil Code.

It is not certain whether our Act adopting the Common Law included the *conditional fee* at Common Law or its



successor, the fee tail, under the statute *de donis*. The Codes supersede both, and hence both are named as abolished.

**SEC. 764.** Where a remainder in fee is limited upon any estate, which would by the Common Law be adjudged a conditional fee, or fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of his death.

Certain  
remainders  
valid.

N. Y. C. C., Sec. 221.

**SEC. 765.** Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

Freeholds.  
Chattels real  
Chattel  
interests.

N. Y. C. C., Sec. 222.

**SEC. 766.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

Estates for  
life of a third  
person, when  
a freehold,  
etc.

N. Y. C. C., Sec. 223.

**SEC. 767.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

Future  
estates, what

N. Y. C. C., Sec. 224.

**SEC. 768.** A reversion is the residue of an estate left, by operation of law, in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Reversions.

N. Y. C. C., Sec. 225.

**SEC. 769.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Remainders.

N. Y. C. C., Sec. 226.

**SEC. 770.** The provisions of Tit. II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the

Limitations  
of chattels  
real.

absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

N. Y. C. C., Sec. 227. .

Suspension  
by trust.

SEC. 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Sec. 715.

N. Y. C. C., Sec. 228.

Contingent  
remainder  
in fee.

SEC. 772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

N. Y. C. C., Sec. 229.

Remainders,  
future and  
contingent  
estates, how  
created.

SEC. 773. Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.

N. Y. C. C., Sec. 230.

Limitation  
of successive  
estates for  
life.

SEC. 774. Successive estates for life cannot be limited, except to persons in being at the creation thereof; and where a remainder is limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estates had been created.

N. Y. C. C., Sec. 231.

Remainder  
upon estates  
for life of  
third person.

SEC. 775. No remainder can be created upon an estate for the life of any other person than the grantee or de-

visée of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term for years, unless it is for the whole residue of such term.

N. Y. C. C., Sec. 232.

**Sec. 776.** When a remainder is created upon an estate for the life of any other person than the grantee or devisee thereof, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder, if valid in its creation, takes effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced. Same.

N. Y. C. C., Sec. 233.

**Sec. 777.** A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. Contingent remainder on a term of years.

N. Y. C. C., Sec. 234.

**Sec. 778.** No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate. Remainder of estates for life.

N. Y. C. C., Sec. 235.

**Sec. 779.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. Remainder upon a contingency.

N. Y. C. C., Sec. 236.

**Sec. 780.** When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life. Heirs of a tenant for life, when to take as purchasers.

N. Y. C. C., Sec. 237.

**Sec. 781.** When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed in- Construction of certain remainders.

tended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

N. Y. C. C., Sec. 238.

Effect of  
power of  
appointment

SEC. 782. A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

N. Y. C. C., Sec., 239.

## CHAPTER II.

### TERMINATION OF ESTATES.

SECTION 788. Tenancy at will may be terminated by notice.

789. Form and service of notice.

790. Effect of notice.

791. Notice by tenant.

792. Double rent may be collected.

793. Re-entry, when and how to be made.

794. Summary proceedings in certain cases provided for.

795. Notice not necessary before action.

Tenancy at  
will may be  
terminated  
by notice.

SEC. 788. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice to the tenant, in the manner prescribed by the next section, to remove from the premises within a period of not less than one month, to be specified in the notice.

N. Y. C. C., Sec. 240; Stats. 1861, 514, Sec. 1.

Form and  
service of  
notice.

SEC. 789. The notice prescribed by the last section must be in writing, and must be served by delivering the same to the tenant, or to some person of discretion residing on the premises; or if neither can, with reasonable diligence, be found, the notice may be served by affixing it on a conspicuous part of the premises, where it may be conveniently read.

N. Y. C. C., Sec. 241; Stats. 1861, 514, Sec. 2.

Effect of  
notice.

SEC. 790. After the notice prescribed by Secs. 788 and 789 has been served in the manner therein directed, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession.

N. Y. C. C., Sec. 242; Stats. 1861, 514, Sec. 3.

**SEC. 791.** If any tenant shall give notice of his intention to quit the premises and shall not deliver up the possession at the time specified in the notice, he shall pay to the landlord double rent during the time he continues in possession after such notice.

Notice by  
tenant.

"Landlord and Tenant," Sec. 4.

**SEC. 792.** If any tenant, or any person in collusion with the tenant, shall hold over any lands or tenements after demand made and one month's notice in writing given, in the manner prescribed in Sec. 789, requiring the possession thereof, such person holding over shall pay to the landlord double rent during the time he continues in possession after such notice, and such special damages as may be suffered by the landlord.

Double rent  
may be col-  
lected.

"Landlord and Tenant," Sec. 5.

**SEC. 793.** Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days notice, as provided in Secs. 1161 and 1162, CODE OF CIVIL PROCEDURE.

Re-entry,  
when and  
how to be  
made.

N. Y. C. C., Sec. 243.

**SEC. 794.** Summary proceedings for obtaining possession of real property forcibly entered or forcibly and unlawfully detained, are provided in Secs. 1159 to 1175, both inclusive, of the CODE OF CIVIL PROCEDURE.

Summary  
proceedings  
in certain  
cases pro-  
vided for.

**SEC. 795.** An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, in the District Court, after the right to re-enter has accrued, without the notice prescribed in Sec. 793.

Notice not  
necessary  
before action

N. Y. C. C., Sec. 244.

## CHAPTER III.

### SERVITUDES.

**SECTION 801.** Servitudes attached to land.

802. Servitudes not attached to land.

803. Designation of estates.

804. By whom grantable.

SECTION 805. By whom held.

806. Extent of servitudes.

807. Apportioning easements.

808. Rights of owner of future estate.

809. Actions by owner and occupant of dominant tenement.

810. Actions by owner of servient tenement.

811. How extinguished.

Servitudes  
attached to  
land.

SEC. 801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements :

1. The right of pasture.
2. The right of fishing.
3. The right of taking game.
4. The right of way.
5. The right of taking water, wood, minerals and other things.
6. The right of transacting business upon land.
7. The right of conducting lawful sports upon land.
8. The right of receiving air, light or heat from or over, or discharging the same upon or over, land.
9. The right of receiving water from or discharging the same upon land.
10. The right of flooding land.
11. The right of having water flow without diminution or disturbance of any kind.
12. The right of using a wall as a party wall.
13. The right of receiving more than natural support from adjacent land or things affixed thereto.
14. The right of having the whole of a division fence maintained by a coterminous owner.
15. The right of having public conveyances stopped, or of stopping the same, on land.
16. The right of a seat in church.
17. The right of burial.

N. Y. C. C., Sec. 245.

Servitudes  
not attached  
to land.

SEC. 802. The following land burdens, or servitudes upon land, may be granted and held, though not attached to land :

1. The right of fishing and taking game.
2. The right of a seat in church.
3. The right of burial.
4. The right of taking rents and tolls.
5. The right of way.

N. Y. C. C., Sec. 246.

**Sec. 803.** The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Designation  
of estates.

N. Y. C. C., Sec. 247.

**Sec. 804.** A servitude can be created only by one who has a vested estate in the servient tenement.

By whom  
grantable.

N. Y. C. C., Sec. 248.

**Sec. 805.** A servitude thereon cannot be held by the owner of the servient tenement.

By whom  
held.

N. Y. C. C., Sec. 249.

**Sec. 806.** The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Extent of  
servitudes.

N. Y. C. C., Sec. 250.

**Sec. 807.** In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

Apportion-  
ing ease-  
ments.

N. Y. C. C., Sec. 254.

**Sec. 808.** The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Rights of  
owner of  
future estate

N. Y. C. C., Sec. 252.

**Sec. 809.** The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

Actions by  
owner and  
occupant of  
dominant  
tenement.

N. Y. C. C., Sec. 253.

**Sec. 810.** The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

Actions by  
owner of  
servient  
tenement.

N. Y. C. C., Sec. 254.

How extin-  
guished.

SEC. 811. A servitude is extinguished—

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person.
2. By the destruction of the servient tenement.
3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

N. Y. C. C., Sec. 250.

## TITLE III.

### RIGHTS AND OBLIGATIONS OF OWNERS.

#### CHAPTER I. RIGHTS OF OWNERS.

#### II. OBLIGATIONS OF OWNERS.

### CHAPTER I.

#### RIGHTS OF OWNERS.

#### ARTICLE I. INCIDENTS OF OWNERSHIP.

#### II. BOUNDARIES.

### ARTICLE I.

#### INCIDENTS OF OWNERSHIP.

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818. Rights of tenant for life.
819. Rights of tenant for years, etc.
820. Same.
821. Rights of grantees of rents and reversion.
822. Rights of lessees and their assignees, etc.
823. Remedy on leases for life.
824. Rent dependent on life.
825. Remedy of reversioners, etc.

Water.

SEC. 817. The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite



stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

N. Y. C. C., Sec. 256.

**NOTE.**—Probably this section had better be omitted in the Code, and the whole subject of water rights postponed until a system for both *mining* and *irrigating* purposes can be carefully prepared. This would require two or three months of research, thought and careful arrangement.

**SEC. 818.** The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

Rights of  
tenant for  
life.

N. Y. C. C., Sec. 257.

**SEC. 819.** A tenant for years or at will, unless he is a wrong-doer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy, and cultivate and harvest the crops growing at the end of his tenancy.

Rights of  
tenant for  
years, etc.

N. Y. C. C., Sec. 258.

**SEC. 820.** A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

Same.

N. Y. C. C., Sec. 259.

**SEC. 821.** A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.

Rights of  
grantees of  
rents and  
reversion.

N. Y. C. C., Sec. 260.

**SEC. 822.** Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon

Rights of  
lessees and  
their assign-  
ees, etc.

covenants against encumbrances or relating to the title or possession of the premises.

N. Y. C. C., Sec. 261.

Remedy on  
leases for life

SEC. 823. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years

N. Y. C. C., Sec. 263.

Rent de-  
pendent on  
life.

SEC. 824. Rent dependent on the life of a person may be recovered after as well as before his death.

N. Y. C. C., Sec. 264.

Remedy of  
reversioners,  
etc.

SEC. 825. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

N. Y. C. C., Sec. 265.

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## ARTICLE II.

### BOUNDARIES.

SECTION 829. Rights of owner.

830. Boundaries by water.

831. Boundaries by ways.

832. Lateral and subjacent support.

833. Trees whose trunks are wholly on land of one.

834. Line trees.

Rights of  
owner.

SEC. 829. The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

N. Y. C. C., Sec. 266.

Boundaries  
by water.

SEC. 830. When land borders upon tide land, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

N. Y. C. C., Sec. 267.

**Sec. 831.** An owner of land bounded by a road or street is presumed to own to the centre of the way, but the contrary may be shown. Boundaries by ways.

N. Y. C. C., Sec. 268; Kittle vs. Pfeiffer, 29 Cal., 484.

**Sec. 832.** Each coterminous owner is entitled to the lateral and subjacent support which his land by nature receives from the land of the other. Lateral and subjacent support.

N. Y. C. C., Sec. 269.

**Sec. 833.** Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another. Trees whose trunks are wholly on land of one.

N. Y. C. C., Sec. 270.

**Sec. 834.** Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common. Line trees.

N. Y. C. C., Sec. 271.

## CHAPTER II.

### OBLIGATIONS OF OWNERS.

**Section 840.** Duties of tenant for life.

**841.** Monuments and fences.

**Sec. 840.** The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance. Duties of tenant for life.

N. Y. C. C., Sec. 272.

**Sec. 841.** Coterminous owners are mutually bound equally to maintain— Monuments and fences.

1. The boundaries and monuments between them.

2. The fences between them; unless one of them chooses to let his land lie without fencing; in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

N. Y. C. C., Sec. 273.

## TITLE IV.

## USES AND TRUSTS.

**SECTION 847.** What uses and trusts may exist.

- 848. Right to possession of land creates legal ownership.
- 849. Certain trusts unaffected.
- 850. Trustees of estate for use of another take no interest.
- 851. Preceding sections qualified.
- 852. Trust must be in writing.
- 853. Transfer to one for money paid by another.
- 854. Rights of creditors.
- 855. Sec. 853 qualified.
- 856. Purchasers protected.
- 857. For what purposes express trusts may be created.
- 858. Certain devises in trust to be deemed powers.
- 859. Profits of land liable to creditors in certain cases.
- 860. Other express trusts to be powers in trust.
- 861. Creation of certain powers not prohibited.
- 862. And land, etc., to descend to persons entitled.
- 863. Trustees of express trusts to have whole estate.
- 864. Author of trust may devise, etc.
- 865. Title of grantor of trust property.
- 866. Interests remaining in grantor of express trust.
- 867. Powers over trust of party interested.
- 868. Same.
- 869. Effect of omitting trust in conveyance.
- 870. Certain sales, etc., by Trustees, void.
- 871. When estate of Trustee to cease.

What uses  
and trusts  
may exist.

**SEC. 847.** Uses and trusts in relation to real property, are those only which are specified in this Title.

N. Y. C. C., Sec. 274.

Right to  
possession of  
land creates  
legal owner-  
ship.

**SEC. 848.** Every person who, by virtue of any transfer or devise, is entitled to the actual possession of real property, and the receipt of the rents and profits thereof, is to be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

N. Y. C. C., Sec. 276.

Certain  
trusts un-  
affected.

**SEC. 849.** The last section does not divest the estate of any Trustee in a trust, where the title of such Trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

N. Y. C. C., Sec. 277.

**Sec. 850.** Every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person, to the use of or in trust for another, no estate or interest vests in the Trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof.

Trustees of estate for use of another take no interest.

N. Y. C. C., Sec. 278.

**Sec. 851.** The preceding sections of this Title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

Preceding sections qualified.

N. Y. C. C., Sec. 279.

**Sec. 852.** No trust in relation to real property is valid, unless created or declared—

Trust must be in writing

1. By a written instrument, subscribed by the Trustee, or by his agent thereto authorized by writing.

2. By the instrument under which the Trustee claims the estate affected; or,

3. By operation of law.

N. Y. C. C., Sec. 280; Cal. C. C. P., Sec. 1971.

**Sec. 853.** Where a transfer of real property is made to one person, and the consideration therefor is paid by or for another, no use or trust results in favor of the person by or for whom such payment is made; but the title vests in the grantee, subject only to the provisions of the next two sections.

Transfer to one for money paid by another.

N. Y. C. C., Sec. 281.

**Sec. 854.** Every such transfer as is described in the last section is presumed to be fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors, to the extent necessary to satisfy their just demands:

Rights of creditors.

N. Y. C. C., Sec. 282.

**Sec. 855.** Sec. 853 does not apply—

1. To cases where the grantee took the grant as an absolute transfer in his own name, without the consent or knowledge of the person paying the consideration; nor,

Sec. 853 qualified.

2. To cases where the grantee, in violation of a trust, purchased the real property so transferred, with property belonging to another person.

N. Y. C. C., Sec. 283.

Purchasers  
protected.

SEC. 856. No implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property, for value and without notice of the trust.

N. Y. C. C., Sec. 284.

For what  
purposes ex-  
press trusts  
may be  
created.

SEC. 857. Express trusts may be created for any of the following purposes :

1. To sell real property for the benefit of creditors.
2. To sell, mortgage or lease real property, for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of Tit. II of this Part ; or,
4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same Title.

N. Y. C. C., Sec. 285.

Certain de-  
vices in  
trust to be  
deemed  
powers.

SEC. 858. A devise of real property to executors or other Trustees, to be sold or mortgaged, where the Trustees are not also empowered to receive the rents and profits, vests no estate in them ; but the trust is valid as a power in trust.

N. Y. C. C., Sec. 286.

Profits of  
land liable  
to creditors  
in certain  
cases.

SEC. 859. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

N. Y. C. C., Sec. 287.

**SEC. 860.** Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the Trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in Tit. V of this Part.

Other express trusts to be powers in trust.

N. Y. C. C., Sec. 288.

**SEC. 861.** Nothing in this Title prevents the creation of a power in trust for any of the purposes for which an express trust may be created.

Creation of certain powers not prohibited.

N. Y. C. C., Sec. 289.

**SEC. 862.** In every case where a trust is valid as a power in trust, the real property to which the trust relates remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust.

And land, etc., to descend to persons entitled

N. Y. C. C., Sec. 290.

**SEC. 863.** Except as hereinafter otherwise provided, every express trust in real property, valid as such, in its creation, vests the whole estate in the Trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

Trustees of express trusts to have whole estate.

N. Y. C. C., Sec. 291.

**SEC. 864.** Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

Author of trust may devise, etc.

N. Y. C. C., Sec. 292.

**SEC. 865.** The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the Trustees and those lawfully claiming under them.

Title of grantor of trust property.

N. Y. C. C., Sec. 293.

Interests  
remaining  
in grantor of  
express trust

SEC. 866. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust, or his successors.

N. Y. C. C., Sec. 294.

Powers over  
trust of party  
interested.

SEC. 867. The beneficiary of a trust for the receipt of the rents and profits of real property cannot transfer or in any manner dispose of his interest in such trust.

N. Y. C. C., Sec. 295.

Same.

SEC. 868. The beneficiary of a trust for the payment of an annuity out of the rents and profits of real property, or of a sum in gross, can dispose of his interest in such trust.

N. Y. C. C., Sec. 296.

Effect of  
omitting  
trust in con-  
veyance.

SEC. 869. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the Trustee, such grant must be deemed absolute in favor of the subsequent creditors of the Trustees, not having notice of the trust, and in favor of purchasers from such Trustees, without notice, and for a valuable consideration.

N. Y. C. C., Sec. 297.

Certain  
sales, etc.,  
by Trustees,  
void.

SEC. 870. Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the Trustees, in contravention of the trust, is absolutely void.

N. Y. C. C., Sec. 298.

When estate  
of Trustee  
to cease.

SEC. 871. When the purpose for which an express trust was created ceases, the estate of the Trustee also ceases.

N. Y. C. C., Sec. 299.

## TITLE V.

### POWERS.

SECTION 877. What powers exist.

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- SECTION 881.** Division of powers.
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917. General and beneficial powers to married women.
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920. Same.
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930. Special and beneficial powers liable to creditors.
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934. Construction of certain powers.

**SECTION 935. Same.**

936. When Court to execute power.

937. Same.

938. Execution of trust power when compelled by creditors, etc.

939. Defective execution.

940. Application of certain sections.

**What powers exist.****SEC. 877.** Powers, in relation to real property, are those only which are specified in this Title.

N. Y. C. C., Sec. 300.

**Application of this Title.****SEC. 878.** The provisions of this Title do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit.

N. Y. C. C., Sec. 301.

**Definition of a power.****SEC. 879.** A power, as the term is used in this Title, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

N. Y. C. C., Sec. 302.

**Terms "author of a power" and "holder of a power" defined.****SEC. 880.** The author of a power, as the term is used in this Title, is the person by whom a power is created, whether by grant or devise; and the holder of a power is the person in whom a power is vested, whether by grant, devise or reservation.

N. Y. C. C., Sec. 303.

**Division of powers.****SEC. 881.** Powers are general or special, and beneficial or in trust.

N. Y. C. C., Sec. 304.

**Definition of general powers.****SEC. 882.** A power is general, when it authorizes the alienation or encumbrance of a fee in the property embraced therein, by grant, will or charge, or any of them, in favor of any person whatever.

N. Y. C. C., Sec. 305.

**Definition of special powers.****SEC. 883.** A power is special—

1. When a person or class of persons is designated, to whom the disposition of property under the power is to be made; or,

2. When it authorizes the alienation or encumbrance, by means of a grant, will or charge, of only an estate less than a fee.

N. Y. C. C., Sec. 306.

**SEC. 884.** A power is beneficial, when no person other than its holder has, by the terms of its creation, any interest in its execution.

Beneficial powers.

N. Y. C. C., Sec. 307.

**SEC. 885.** A power is in trust, when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution.

Powers in trust.

N. Y. C. C., Sec. 308.

**SEC. 886.** A general power is in trust, when any person or class of persons, other than its holder, is designated as entitled to the proceeds of the disposition or charge authorized by the power, or to any portion of the proceeds or other benefits to result from its execution.

General powers, when in trust.

N. Y. C. C., Sec. 309.

**SEC. 887.** A special power is in trust—

Special powers, when in trust.

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons, other than the holder of the power; or,

2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.

N. Y. C. C., Sec. 310.

**SEC. 888.** No person is capable of creating a power, who is not at the same time capable of granting some estate in the property to which the power relates.

Who may create power

N. Y. C. C., Sec. 311.

**SEC. 889.** A power may be vested in any person.

To whom power may be given.

N. Y. C. C., Sec. 312.

**SEC. 890.** A power may be created only—

How created

1. By a suitable clause, contained in a grant of some estate in the real property to which the power relates, or in an agreement to execute such a grant; or,

2. By a devise contained in a will.

N. Y. C. C., Sec. 313.

**SEC. 891.** The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus

Reservation of powers in conveyances

reserved is subject to the provisions of this Title in the same manner as if granted to another.

N. Y. C. C., Sec. 314.

When power  
irrevocable.

SEC. 892. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is given or reserved in the instrument creating the power.

N. Y. C. C., Sec. 315.

When power  
a lien.

SEC. 893. A power is a lien upon the real property which it embraces, from the time the instrument in which it is contained takes effect; except that against creditors, purchasers and encumbrancers, in good faith and without notice from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

N. Y. C. C., Sec. 316.

Power of sale  
in mortgage.

SEC. 894. Where a power to sell real property is given to a mortgagee or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid; but such power is subject to the provisions of Chap. —, CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 317.

Beneficial  
powers, etc.,  
transferred  
by insolvent  
assignments.

SEC. 895. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, passes to the assignees, pursuant to statute, of the estate of a non-resident, absconding, insolvent or imprisoned debtor, or of a person of unsound mind, in whom such a power or interest is vested.

N. Y. C. C., Sec. 318.

Who to exe-  
cute powers.

SEC. 896. A power cannot be executed by any person not capable of disposing of real property.

N. Y. C. C., Sec. 319.

Married  
women.

SEC. 897. A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

N. Y. C. C., Sec. 320.

**SEC. 898.** No power can be executed by a married woman before she attains her majority, nor without being acknowledged by her in the manner prescribed by the chapter on *Recording Transfers*. Same.

N. Y. C. C., Sec. 321.

**SEC. 899.** A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner. How executed.

N. Y. C. C., Sec. 322.

**SEC. 900.** Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power. Execution by survivors.

N. Y. C. C., Sec. 323.

**SEC. 901.** Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the Title on *Wills*. Execution of power to dispose by devise.

N. Y. C. C., Sec. 324.

**SEC. 902.** Where a power is confined to a disposition by grant, it cannot be executed by will, even though the disposition is not intended to take effect until after the death of the person executing the power. Execution of power to dispose by grant.

N. Y. C. C., Sec. 325.

**SEC. 903.** Where the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this Title. Directions by author, when disregarded.

N. Y. C. C., Sec. 326.

**SEC. 904.** Where the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power. Same.

N. Y. C. C., Sec. 327.

Nominal  
conditions.

SEC. 905. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

N. Y. C. C., Sec. 328.

When direc-  
tions of  
author to be  
observed.

SEC. 906. With the exceptions contained in the preceding sections, the intentions of the author of a power, as to the mode, time and conditions of its execution, must be observed, subject to the power of the Court to supply a defective execution in the cases provided in Secs. 915 and 939.

N. Y. C. C., Sec. 329.

Consent of  
third person  
to execution  
of power.

SEC. 907. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, according to the chapter on *Recording Transfers*.

N. Y. C. C., Sec. 330.

Same.

SEC. 908. Where the consent of several persons to the execution of a power is requisite, all must consent thereto; but, in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

N. Y. C. C., Sec. 331.

Omission to  
recite power

SEC. 909. Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, even though not recited or referred to therein.

N. Y. C. C., Sec. 332.

Instruments  
deemed  
conveyances

SEC. 910. Every instrument, except a will, in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance, within the meaning of the chapter on *Recording Transfers*.

N. Y. C. C., Sec. 333.

**SEC. 911.** A disposition or charge, by virtue of a power, more extensive than was authorized thereby, is not therefore void; but every estate or interest so created, so far as it is embraced by the terms of the power, is valid.

N. Y. C. C., Sec. 334.

Certain  
dispositions  
not void.

**SEC. 912.** The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power.

N. Y. C. C., Sec. 335.

Computation  
of term of  
suspension.

**SEC. 913.** No estate or interest can be given or limited to any person, by an instrument in execution of a power, which could not have been given or limited at the time of the creation of the power.

N. Y. C. C., Sec. 336.

What estate  
may be  
given.

**SEC. 914.** When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried.

N. Y. C. C., Sec. 337.

Married  
women, their  
authority.

**SEC. 915.** Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

N. Y. C. C., Sec. 338.

Defective  
execution.

**SEC. 916.** Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or Trustees.

N. Y. C. C., Sec. 339.

Fraud.

**SEC. 917.** A general and beneficial power is valid, which gives to a married woman power to dispose, during her marriage, and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee.

N. Y. C. C., Sec. 340.

General and  
beneficial  
powers to  
married  
women.

**SEC. 918.** Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a par-

Estate of  
owner for  
life, etc.,  
when  
changed into  
a fee

particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power should not be executed, or the property should not be sold for the satisfaction of debts.

N. Y. C. C., Sec. 341.

Certain powers create a fee.

SEC. 919. Where an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers and encumbrancers.

N. Y. C. C., Sec. 342.

Same.

SEC. 920. In all cases where an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee.

N. Y. C. C., Sec. 343.

Effect of power to devise inheritance in certain cases

SEC. 921. Where a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition, within the meaning of the last three sections.

N. Y. C. C., Sec. 344.

Power to dispose of fee.

SEC. 922. Every power of disposition is deemed absolute, by means of which the holder is enabled, in his lifetime, to dispose of the entire fee, in possession or in expectancy, for his own benefit.

N. Y. C. C., Sec. 345.

Power to revoke.

SEC. 923. Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

N. Y. C. C., Sec. 346.

Special and beneficial powers, who may take.

SEC. 924. A special and beneficial power is valid which is granted—

1. To a married woman to dispose, during the marriage, of any estate less than a fee, belonging to her, in the property to which the power relates; or,



2. To the owner of a life estate in the property embraced in the power, to make leases for not more than twenty-one years, commencing in possession during his life.

N. Y. C. C., Sec. 347.

SEC. 925. A special and beneficial power to make leases of agricultural land for more than ten years, or of town and city lots for more than twenty years, is void only as to the time beyond ten or twenty years, and authorizes leases for those terms or less.

Construction of leasing powers.

N. Y. C. C., Sec. 348; Stats. 1851, 169, Sec. 1.

SEC. 926. The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate, and will pass, unless specially excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

Power to make leases by owner for life.

N. Y. C. C., Sec. 349.

SEC. 927. The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property, and is thereupon extinguished.

Release of such power.

N. Y. C. C., Sec. 350.

SEC. 928. A mortgage, executed by the owner of a life estate having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein.

Mortgages by party having power to lease, etc.

N. Y. C. C., Sec. 351.

SEC. 929. The effects on the power of a lien by mortgage, such as is mentioned in the last section, are—

Effect thereof.

1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his lien may require it; and,

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage in the same manner as if in terms embraced therein.

N. Y. C. C., Sec. 352.

SEC. 930. Every special and beneficial power is liable to the claims of creditors in the same manner as other

Special and beneficial powers liable to creditors.

interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

N. Y. C. C., Sec. 353.

Future beneficial powers

SEC. 931. No beneficial power, general or special, not already specified and defined in this Title, can hereafter be created.

N. Y. C. C., Sec. 354.

Trust powers imperative.

SEC. 932. Every trust power, unless its execution is made expressly to depend on the will of the Trustee, is imperative, and imposes a duty on the Trustee, the performance of which may be compelled for the benefit of the parties interested.

N. Y. C. C., Sec. 355.

Effect of right of selection.

SEC. 933. A trust power does not cease to be imperative where the Trustee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

N. Y. C. C., Sec. 356.

Construction of certain powers.

SEC. 934. Where a disposition under a power is directed to be made to, among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled in equal proportion.

N. Y. C. C., Sec. 357.

Same.

SEC. 935. Where the terms of a power import that the estate or fund is to be distributed among several persons designated, in such manner or proportions as the Trustee of the power may think proper, the Trustee may allot the whole to any one or more of such persons in exclusion of the others.

N. Y. C. C., Sec. 358.

When Court to execute power.

SEC. 936. If the Trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as objects of the trust.

N. Y. C. C., Sec. 359.

Same.

SEC. 937. Where a power in trust is created by will, and the testator has omitted to designate, expressly or by

necessary implication, by whom the power is to be executed, its execution devolves on the District Court.

N. Y. C. C., Sec. 360.

**SEC. 938.** The execution, in whole or in part, of any trust power, may be adjudged for the benefit of the creditors or assignees of any person entitled, as one of the beneficiaries of the trust, to compel its execution, when his interest is transferable.

Execution of trust power when compelled by creditors, etc

N. Y. C. C., Sec. 361.

**SEC. 939.** Where the execution of a power in trust is defective, in whole or in part, under the provisions of this Title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

Defective execution.

N. Y. C. C., Sec. 362.

**SEC. 940.** The provisions of the Title on *Trust*, saving the rights of other persons from prejudice by the misconduct of Trustees, and authorizing the Court to remove and appoint Trustees; the provisions of the Title on *Succession*, devolving express trusts upon the Court, on the death of the Trustee; and the provisions of Sec. 871, in the Title on *Uses and Trusts*, apply equally to powers in trust, and the Trustees of such power.

Application of certain sections.

N. Y. C. C., Sec. 363.



# PART III.

## PERSONAL OR MOVABLE PROPERTY.

### TITLE I. PERSONAL PROPERTY IN GENERAL.

### II. PARTICULAR KINDS OF PERSONAL PROPERTY.

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## TITLE I.

### PERSONAL PROPERTY IN GENERAL.

SECTION 946. By what law governed.

947. Future interests in perishable property, how protected.

SEC. 946. If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

By what law governed.

N. Y. C. C., Sec. 364.

SEC. 947. Where one has the present and another the future interest in a thing personal, and the thing is perishable, the latter may require it to be sold, and the proceeds invested for the benefit of both parties, according to their respective interests; except in case of a thing specially appropriated to a particular use.

Future interests in perishable property, how protected.

N. Y. C. C., Sec. 365.

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## TITLE II.

### PARTICULAR KINDS OF PERSONAL PROPERTY.

#### CHAPTER I. THINGS IN ACTION.

#### II. SHIPPING.

#### III. PRODUCTS OF THE MIND.

#### IV. OTHER KINDS OF PERSONAL PROPERTY.

## CHAPTER I.

## THINGS IN ACTION.

SECTION 953. Things in action defined.

954. Transfer and survivorship.

Things in  
action de-  
fined.

SEC. 953. A thing in action is a right to recover something by a judicial proceeding.

N. Y. C. C., Sec. 366.

Transfer and  
survivorship

SEC. 954. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the CODE OF CIVIL PROCEDURE, it passes to his devisees or successor in office.

N. Y. C. C., Sec. 367.

## CHAPTER II.

## SHIPPING.

ARTICLE I. GENERAL PROVISIONS.

II. RULES OF NAVIGATION.

## ARTICLE I.

## GENERAL PROVISIONS.

SECTION 960. Definition of a ship.

961. Appurtenances and equipments.

962. Foreign and domestic navigation.

963. Foreign and domestic ships distinguished.

964. Several owners.

965. Owner for voyage.

966. Registry, etc.

Definition  
of a ship.

SEC. 960. A ship is any structure fitted for navigation. Every kind of ship is included in the term "shipping."

N. Y. C. C., Sec. 368.

Appurte-  
nances and  
equipments.

SEC. 961. All things, belonging to the owners, which are on board a ship, and are connected with its proper

use, for the objects of the voyage and adventure in which the ship is engaged, are deemed its appurtenances.

N. Y. C. C., Sec. 369.

SEC. 962. Ships are engaged either in foreign or domestic navigation, or in the fisheries. Ships are engaged in foreign navigation when passing to or from a foreign country; and in domestic navigation, when passing from place to place within the United States.

Foreign and domestic navigation.

N. Y. C. C., Sec. 370.

SEC. 963. A ship in a port of the State to which it belongs is called a domestic ship; in another port it is called a foreign ship.

Foreign and domestic ships distinguished.

N. Y. C. C., Sec. 371.

SEC. 964. If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any Court of competent jurisdiction.

Several owners.

N. Y. C. C., Sec. 372,

SEC. 965. If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

Owner for voyage.

N. Y. C. C., Sec. 373.

SEC. 966. The registry, enrolment and license of ships are regulated by Acts of Congress.

Registry, etc.

N. Y. C. C., Sec. 374.

## ARTICLE II.

### RULES OF NAVIGATION.

#### SECTION 970. Collisions.

1. Rules as to ships meeting each other.
2. The rule for sailing vessels.
3. Rules for steamers in narrow channels.
4. Same.
5. Rules for steam vessels on different courses.
6. Meeting of steamers.

971. Collision from breach of rules.

972. Breaches of such rules to imply wilful default.

973. Loss, how apportioned.

## Collisions.

SEC. 970. In the case of ships meeting, the following rules must be observed, in addition to those prescribed by that part of the POLITICAL CODE which relates to *Navigation* :

Rules as to  
ships meet-  
ing each  
other.

1. Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both ships must be put to port so as to pass on the port side of each other; and this rule applies to all steamers and all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, except where the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.

The rule for  
sailing  
vessels.

2. In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each on the larboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack.

Rules for  
steamers in  
narrow  
channels.

3. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of the steamer.

Same.

4. A steamer when passing another steamer in such channel, must always leave the other upon the larboard side.

Rules for  
steam vessels  
on different  
courses.

5. When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other.



6. The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam whistle, or by the regulations concerning lights upon steamers, prescribed under authority of the Acts of Congress approved August thirtieth, eighteen hundred and fifty-two, and April twenty-ninth, eighteen hundred and sixty-four.

Meeting of  
steamers.

N. Y. C. C., Sec. 375.

NOTE.—For regulations prescribed by the Acts mentioned in Subd. 6, see note at end of this article.

SEC. 971. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section, the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary.

Collision  
from breach  
of rules.

N. Y. C. C., Sec. 376.

SEC. 972. Damage to person or property arising from the failure of a ship to observe any rule of Sec. 970, must be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary.

Breaches of  
such rules  
to imply  
wilful  
default.

N. Y. C. C., Sec. 377.

SEC. 973. Losses caused by collision are to be borne as follows :

Loss, how  
apportioned.

1. If either party was exclusively in fault he must bear his own loss, and compensate the other for any loss he has sustained.

2. If neither was in fault, the loss must be borne by him on whom it falls.

3. If both were in fault, the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned.

4. If it cannot be ascertained where the fault lies, the loss must be equally divided.

N. Y. C. C., Sec. 378.

## NOTE.

The regulations prescribed by the Board of Inspectors, under authority of the Act of 1852, are as follows :

All pilots of steamers navigating seas, gulfs, lakes, bays or rivers (except rivers emptying into the Gulf of Mexico and their tributaries), when meeting or approaching each other, whether by day or by night, and as soon as within sight and fully within sound of the steam whistle, shall observe and comply with the following

## REGULATIONS.

**RULE 1.** When steamers meet "head and head," it shall be the duty of each to pass to the right or larboard side of the other. And either pilot, upon determining to pursue this course, shall give, as a signal of his intention, *one* short and distinct blast of his steam whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left or on the starboard side of each other.

**NOTE.**—*In the night*, steamers will be considered meeting "head and head" so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

**RULE 2.** When steamers are approaching each other in an oblique direction (as shown in diagram of fifth situation), they will pass to the right, as if meeting "head and head," and the signal, by whistle, shall be given and answered promptly, as in that case specified.

**RULE 3.** If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given and answered erroneously, or from other cause, the pilot, so in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered and understood, or until the vessels shall have passed each other.

**RULE 4.** When steamers are running in a fog or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

**RULE 5.** Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by *one* long blast of the steam whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly.

**RULE 6.** The signals by blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

**N. B.**—The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves—under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

## STEAMERS' LIGHTS, TO PREVENT COLLISION AT NIGHT.

**RULE 7.** *When under weigh.* All steamers rigged for carrying sail must carry a bright white light at the foremast head, and all other steamers must

carry a bright white light on the *stem* or near the bow, and another on a mast near the stern, or on the flag-staff at the *stern*, the last named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.

**NOTE.**—Steamers, although rigged for carrying sail, instead of the foremast head light, may adopt the forward and stern lights provided for steamers not rigged for carrying sail, provided such lights are so arranged and placed on the vessel as to secure the contemplated objects.

**When at anchor.** A bright white light, at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

1. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship.

2. The stem and stern lights of the steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

3. The colored side lights to be visible at a distance of at least two miles in a clear dark night; and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely, from right ahead to two points abaft the beam on their respective sides.

4. The side lights are to be fitted with inboard screens of at least *six feet* in length (clear of the lantern), to prevent them from being seen across the bow. The screens are to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

**NOTE 1.** The object of carrying the bright white light at the foremast head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

**NOTE 2.** The object of the colored lights required to be carried on *all* steamers, is to indicate to other vessels the course or direction such steamer may be steering.

**NOTE 3.** The object of requiring steamers not rigged for carrying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

The regulations of the Act of April 29, 1864, which apply to all "mercantile marine," are as follows :

#### REGULATIONS FOR PREVENTING COLLISIONS ON WATER.

##### *Preliminary.*

**ARTICLE 1.** *What to be considered sailing ships and what ships under steam.* In the following rules every steamship which is under sail, and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

#### RULES CONCERNING LIGHTS.

##### *Lights.*

**ART. 2.** The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

##### *Lights for Steamships.*

**ART. 3.** All steam vessels when under way shall carry—

(a.) At the foremast head, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz: from right ahead to two points abaft the beam on either side, and of such a

character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(b.) On the starboard side, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c.) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(d.) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

*Lights for Steam-tugs.*

ART. 4. Steamships, when towing other ships, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.

*Lights for Sailing Ships.*

ART. 5. Sailing ships under way or being towed, shall carry the same lights as steamships under way, with the exception of the white masthead lights, which they shall never carry.

*Exceptional Lights for small Sailing Vessels.*

ART. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

*Lights for Ships at Anchor.*

ART. 7. Ships, whether steamships or sailing ships, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile.

*Lights for Pilot Vessels.*

ART. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

*Lights for Fishing Vessels and Boats.*

ART. 9. Open fishing-boats and other open boats shall not be required to carry side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side, and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light. Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

**RULES GOVERNING FOG-SIGNALS.**

*Fog-signals.*

ART. 10. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes, viz :

- (a.) Steamships under way shall use a steam whistle placed before the funnel, not less than eight feet from the deck.
- (b.) Sailing ships under way shall use a fog-horn.
- (c.) Steamships and sailing ships when not under way shall use a bell.

## STEERING AND SAILING RULES.

*Two Sailing Ships Meeting.*

ART. 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

*Two Sailing Ships Crossing.*

ART. 12. When two sailing ships are crossing, so as to involve the risk of collision, then, if they have the wind on different sides, the ship with wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

*Two Ships Under Steam Meeting.*

ART. 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other.

*Two Ships Under Steam Crossing.*

ART. 14. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

*Sailing Ship and Ship Under Steam.*

ART. 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

*Ships Under Steam to Slacken Speed.*

ART. 16. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.

*Vessels Overtaking Other Vessels.*

ART. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel.

*Construction of Articles 12, 14, 15 and 17.*

ART. 18. Where, by the above rules, one of two ships is to keep out of the way the other shall keep her course, subject to the qualifications contained in the following article:

*Proviso to Save Special Cases.*

ART. 19. In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.

*No Ship, under any Circumstances, to Neglect Proper Precautions.*

ART. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

## CHAPTER III.

## PRODUCTS OF THE MIND.

**SECTION 980.** How far the subject of ownership.

981. Joint authorship.

982. Transfer.

983. Effect of publication.

984. Subsequent inventor, author, etc.

985. Private writings.

How far the  
subject of  
ownership.

**SEC. 980.** The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

N. Y. C. C., Sec. 429.

Joint  
authorship.

**SEC. 981.** Unless otherwise agreed, a product of the mind, in the production of which several persons are jointly concerned, is owned by them as follows:

1. If the product is single, in equal proportions.
2. If it is not single, in proportion to the contribution of each.

N. Y. C. C., Sec. 430.

Transfer.

**SEC. 982.** The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

N. Y. C. C., Sec. 431.

Effect of  
publication.

**SEC. 983.** If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this State is concerned.

The protection afforded by Act of Congress is a matter of Federal legislation, with which the State cannot interfere.

N. Y. C. C., Sec. 432.

Subsequent  
inventor,  
author, etc.

**SEC. 984.** If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the

same extent against all persons except the prior author, or those claiming under him.

N. Y. C. C., Sec. 433.

SEC. 985. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law. Private writings.

N. Y. C. C., Sec. 434.

## CHAPTER IV.

### OTHER KINDS OF PERSONAL PROPERTY.

SECTION 991. Trade marks and signs.

992. Good will of business.

993. Same.

994. Title deeds.

SEC. 991. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade mark, any form, symbol or name, which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation, which relates only to the name, quality or description of the thing or business. Trade marks and signs.

N. Y. C. C., Sec. 435.

SEC. 992. The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. Good will of business.

N. Y. C. C., Sec. 436.

SEC. 993. The good will of a business is property, transferable like any other. Same.

N. Y. C. C., Sec. 437.

SEC. 994. Instruments essential to the title of real property, and which are not kept in a public office as a record, pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title. Title deeds.

N. Y. C. C., Sec. 438.





# PART IV.

## ACQUISITION OF PROPERTY.

- TITLE I. MODES IN WHICH PROPERTY MAY BE ACQUIRED.**
- II. OCCUPANCY.
  - III. ACCESSION.
  - IV. TRANSFER.
  - V. HOMESTEADS.
  - VI. WILLS.
  - VII. SUCCESSION.
  - VIII. MINES.

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### TITLE I.

#### MODES IN WHICH PROPERTY MAY BE ACQUIRED.

**SECTION 1000.** Property, how acquired.

**SEC. 1000.** Property is acquired by—

1. Occupancy.
2. Accession.
3. Transfer.
4. Will; or,
5. Succession.

Property,  
how  
acquired.

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### TITLE II.

#### OCCUPANCY.

**SECTION 1006.** Simple occupancy.

1007. Prescription.

**SEC. 1006.** Occupancy for any period confers a title sufficient against all except the State and those who have

Simple  
occupancy.

title by prescription, mining rules or customs, accession, transfer, will or succession.

N. Y. C. C., Sec. 440.

NOTE.—“Mining rules or customs” is new.

**Prescription**      SEC. 1007. Occupancy for the period prescribed by the CODE OF CIVIL PROCEDURE as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

N. Y. C. C., Sec. 441.

## TITLE III.

### ACCESSION.

#### CHAPTER I. TO REAL PROPERTY.

#### II. TO PERSONAL PROPERTY.

### CHAPTER I.

#### ACCESSION TO REAL PROPERTY.

##### SECTION 1013. Fixtures.

1014. Alluvion.

1015. Sudden removal of bank.

1016. Islands, in navigable streams.

1017. In unnavigable streams.

1018. Islands formed by division of stream.

1019. Abandoned bed of stream.

**Fixtures.**      SEC. 1013. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

N. Y. C. C., Sec. 442.

**Alluvion.**      SEC. 1014. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

N. Y. C. C., Sec. 443.

SEC. 1015. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

Sudden removal of bank.

N. Y. C. C., Sec. 444.

SEC. 1016. Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary.

Islands, in navigable streams.

N. Y. C. C., Sec. 445.

SEC. 1017. An island or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed, or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

In unnavigable streams.

N. Y. C. C., Sec. 446.

SEC. 1018. If a stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

Islands formed by division of stream.

N. Y. C. C., Sec. 447.

SEC. 1019. If a stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived.

Abandoned bed of stream.

N. Y. C. C., Sec. 448.

## CHAPTER II.

### ACCESSION TO PERSONAL PROPERTY.

NOTE.—The provisions of this chapter, except Sec. 1031, are similar to those of the Code Napoleon and the Code of Louisiana.

**SECTION 1025. Accession by uniting several things.**

1026. Principal part, what.

1027. Same.

1028. Uniting materials and workmanship.

1029. Inseparable materials.

1030. Materials of several owners.

1031. Wilful trespassers.

1032. Owner may elect between the thing and its value.

1033. Wrong-doer liable in damages.

Accession by  
uniting sev-  
eral things.

**SEC. 1025.** When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner or surrender the whole to him.

N. Y. C. C., Sec. 449.

Principal  
part, what.

**SEC. 1026.** That part is to be deemed the principal to which the other has been united only for the use, ornament or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

N. Y. C. C., Sec. 450.

Same.

**SEC. 1027.** If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.

N. Y. C. C., Sec. 451.

Uniting  
materials  
and work-  
manship.

**SEC. 1028.** If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

N. Y. C. C., Sec. 452.

Inseparable  
materials.

**SEC. 1029.** Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they

cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

N. Y. C. C., Sec. 453.

SEC. 1030. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner, without whose consent the admixture was made, may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

Materials of several owners.

N. Y. C. C., Sec. 454.

SEC. 1031. The foregoing sections of this article are not applicable to cases in which one wilfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced.

Wilful trespassers.

N. Y. C. C., Sec. 455.

SEC. 1032. In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material, in kind, in the same quantity, weight, measure and quality, or the value thereof; or where he is entitled to the product, the value thereof in place of the product.

Owner may elect between the thing and its value.

N. Y. C. C., Sec. 456.

SEC. 1033. One who wrongfully employs materials belonging to another, is liable to him in damages, as well as under the foregoing provisions of this chapter.

Wrong-doer liable in damages.

N. Y. C. C., Sec. 457.

## TITLE IV.

## TRANSFER.

## CHAPTER I. TRANSFER IN GENERAL.

## II. TRANSFER OF REAL PROPERTY.

## III. TRANSFER OF PERSONAL PROPERTY.

## IV. RECORDING TRANSFERS OF REAL PROPERTY.

## V. UNLAWFUL TRANSFERS.

NOTE.—The obligations of the parties to a transfer for consideration, or to a contract of hiring, are regulated by the Titles on *Sales*, on *Exchange* and on *Hiring*. Transfers in trust for the benefit of creditors are regulated by the Part on *Debtor and Creditor*.

## CHAPTER I.

## TRANSFERS IN GENERAL.

## ARTICLE I. DEFINITION OF TRANSFER.

## II. WHAT MAY BE TRANSFERRED.

## III. MEANS OF TRANSFER.

## IV. INTERPRETATION OF GRANTS.

## V. EFFECT OF TRANSFER.

## ARTICLE I.

## DEFINITION OF TRANSFER.

SECTION 1039. Transfer, what.

1040. Voluntary transfer.

Transfer,  
what.

SEC. 1039. Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one person to another.

N. Y. C. C., Sec. 458.

Voluntary  
transfer.

SEC. 1040. A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity.

N. Y. C. C., Sec. 459.

## ARTICLE II.

## WHAT MAY BE TRANSFERRED.

SECTION 1044. What may be transferred.

1045. Possibility.

1046. Right of re-entry can be transferred.

1047. Owner ousted of possession may transfer.

SEC. 1044. Property of any kind may be transferred, except as otherwise provided by this article.

What may  
be trans-  
ferred.

N. Y. C. C., Sec. 460.

SEC. 1045. A mere possibility, not coupled with an interest, cannot be transferred.

Possibility.

N. Y. C. C., Sec. 461.

SEC. 1046. A right of re-entry, or of repossession for breach of condition subsequent, can be transferred.

Right of re-  
entry can be  
transferred.

[New section.] NOTE.—This reverses the rule in Sec. 462 (N. Y. C. C.). It harmonizes analogically with the following section, which is based on our statute.

SEC. 1047. The owner of real property in the adverse possession of another, may transfer it with the same effect as if in actual possession.

Owner  
ousted of  
possession  
may transfer

[New section.] "Conveyances," Sec. 34.

## ARTICLE III.

## MEANS OF TRANSFER.

SECTION 1051. When oral.

1052. Grant, what.

1053. Term "grant" includes what.

1054. Delivery necessary.

1055. Date.

1056. Delivery to grantee is necessarily absolute.

1057. Grant made on condition subsequent.

1058. Instrument to pass an estate on condition precedent only an executory contract.

1059. Delivery in escrow.

1060. Surrendering or cancelling grant does not reconvey.

1061. Constructive delivery.

SEC. 1051. A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

When oral.

N. Y. C. C., Sec. 464.

**Grant, what.**      **SEC. 1052.** A transfer in writing is called a grant.  
N. Y. C. C., Sec. 464.

**Term "grant" includes what.**      **SEC. 1053.** Every instrument of writing by which property is transferred, whether called a deed, conveyance, bill of sale or grant, means a "grant," as used in this Title.

**Delivery necessary.**      **SEC. 1054.** A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

N. Y. C. C., Sec. 465; *Hastings vs. Vaughan*, 5 Cal., 315; *Bar vs. Schroeder*, 32 Cal., 610. As to delivery, see cases cited to the next section; also, Sec. 1059, on "Escrows."

**Date.**      **SEC. 1055.** A grant duly executed is presumed to have been delivered at its date.

N. Y. C. C., Sec. 466; *Bagley vs. McMickle*, 9 Cal., 430; *Bensley vs. Atwill*, 12 Cal., 231; *Bar vs. Schroeder*, 32 Cal., 610; *Fitch vs. Bunch*, 30 Cal., 208.

**Delivery to grantee is necessarily absolute.**      **SEC. 1056.** A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

N. Y. C. C., Sec. 467.

**Grant made on condition subsequent.**      **SEC. 1057.** Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record.

[New section.]      **NORM.—**This section is intended to secure record evidence of title to the grantor, as fully as he had it before the making of the grant.

**Instrument to pass an estate on condition precedent only an executory contract.**      **SEC. 1058.** An instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon the performance of the condition, the grantee is entitled to a grant from the



grantor or his successors, for the property, duly acknowledged for record.

[New section.]      Mesick vs. Sunderland, 6 Cal., 297; Brannan vs. Mesick, 10 Cal., 95.

**NOTE.**—This is intended to hold back the estate in fee simple until its vesting can be authenticated in a manner entitling it to record, furnishing the means and a motive to the grantee to secure the highest evidence of his title, *for record*, rather than leave it dependent upon a fact or act required to be strictly performed, and liable at any time to be disputed.

**SEC. 1059.** A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. In the possession of the third person, with the condition, it is called an escrow. Delivery in escrow.

N. Y. C. C., Sec. 468; Beem vs. McKusick, 10 Cal., 538; Fitch vs. Bunch, 30 Cal., 208; Byron vs. Bradshaw, 23 Cal., 528.

**NOTE.**—The last clause is new.

**SEC. 1060.** Redelivering a grant of real property to the grantor, or cancelling it, does not operate to retransfer the title. Surrendering or cancelling grant does not reconvey.

N. Y. C. C., Sec. 469; Snodgrass vs. Picketts, 13 Cal., 359; Kearsing vs. Kilian, 18 Cal., 491; Bowman vs. Cadworth, 31 Cal., 148; Killy vs. Willson, 33 Cal., 691; Lawton vs. Gordon, 34 Cal., 86; Byron vs. Bradshaw, 23 Cal., 528.

**SEC. 1061.** Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: Constructive delivery.

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed.

N. Y. C. C., Sec. 470; Hastings vs. Vaughan, 5 Cal., 315.

## ARTICLE IV.

## INTERPRETATION OF GRANTS.

## SECTION 1065. Grants, how interpreted.

1066. Construction of instruments.

1067. Limitations, how controlled.

1068. Recitals, when resorted to.

1069. If language ambiguous, what may be considered.

1070. Interpretation against grantor.

1071. Grant, how construed.

1072. Irreconcilable provisions.

1073. Thing granted must be described.

1074. Words "northerly," "southerly," etc., mean what.

1075. Meaning of "heirs" and "issue," in certain remainders.

1076. Words of inheritance unnecessary.

1077. When fee simple title is presumed to pass.

1078. Subsequently acquired title passes by operation of law.

Grants, how  
interpreted.

SEC. 1065. Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article.

N. Y. C. C., Sec. 472.

Construction  
of instru-  
ments.

SEC. 1066. The interpretation consists in ascertaining, from the language of the instrument, the understanding and intention of the parties at the time of contracting.

[New section.] Brannan vs. Mesick, 10 Cal., 95.

Limitations,  
how con-  
trolled.

SEC. 1067. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

N. Y. C. C., Sec. 473.

Recitals,  
when  
resorted to.

SEC. 1068. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

N. Y. C. C., Sec. 474.

If language  
ambiguous,  
what may be  
considered.

SEC. 1069. Parol testimony may be heard to explain latent ambiguities. In such cases, the state of the country, the state of the thing granted, the circumstances attendant upon the transaction, the particular situation of the parties and their acts concerning the property under or subsequent to the grant, may be considered for the purpose of ascertaining the intention.

[New section.] United States vs. Appleton, 1 Sumner, 502; Mulford vs. Le France, 26 Cal., 89; Brannan vs. Mesick, 10 Cal., 95.

**SEC. 1070.** A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

Interpretation against grantor.

N. Y. C. C., Sec. 475; *Muller vs. Boggs*, 25 Cal., 175; *Dodge vs. Walloy*, 22 Cal., 224; *Vance vs. Fore*, 24 Cal., 435.

**SEC. 1071.** A grant must be interpreted, if possible, to give consistent effect to each word and part.

Grant, how construed.

[New section.] *Aarens vs. Dale*, 18 Cal., 359; *Brannan vs. Mesick*, 10 Cal., 95.

**SEC. 1072.** If several parts of a grant are absolutely irreconcilable, the former part prevails.

Irreconcilable provisions.

N. Y. C. C., Sec. 476; *Havens vs. Dale*, 18 Cal., 359.

**SEC. 1073.** The thing granted must be described so as to be capable of identification.

Thing granted must be described.

[New section.] *Lick vs. O'Donnell*, 3 Cal., 59; *Stanley vs. Green*, 12 Cal., 148; *Schenk vs. Evay*, 24 Cal., 104; *Cadwell vs. Center*, 30 Cal., 539; *Reamer vs. Nesmith*, 34 Cal., 624; *Reed vs. Spier*, 27 Cal., 57; *Vance vs. Fore*, 24 Cal., 435; *Kimball vs. Temple*, 25 Cal., 440.

**SEC. 1074.** The words "northerly," "southerly," "easterly," "westerly," when used in description of land, mean due north, due south, due east, due west, respectively, unless controlled by other words, or by lines, monuments or natural objects.

Words "northerly," "southerly," etc., mean what.

[New section.] *Bosworth vs. Dantiew*, 25 Cal., 296; *Fratt vs. Wood*, 32 Cal., 219; *Colton vs. Seavey*, 22 Cal., 496.

**SEC. 1075.** Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors or issue living at the death of the person named as ancestor.

Meaning of "heirs" and "issue," in certain remainders.

N. Y. C. C., Sec. 477; Stats. 1855, 171, Sec. 2.

**SEC. 1076.** Words of inheritance or succession are not requisite to transfer a fee in real property.

Words of inheritance unnecessary.

N. Y. C. C., Sec. 478; Stats. 1855, 171, Sec. 3.

**SEC. 1077.** A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

When fee simple title is presumed to pass.

[New section.]

Subsequent-  
ly acquired  
title passes  
by operation  
of law.

Sec. 1078. Where a person purports, by proper instrument, to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors.

"Conveyances," Sec. 33.

## ARTICLE V.

### EFFECT OF TRANSFER.

SECTION 1082. What title passes.

1083. What interests affected.

1084. Incidents.

1085. Grant may inure to benefit of stranger.

What title  
passes.

Sec. 1082. A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or is necessarily implied, and no more, except in the cases specified in Secs. 1083, 1142, —, —.

N. Y. C. C., Sec. 479.

NOTE.—The blank sections correspond to Secs. 1745 and 1773 of the New York Civil Code.

What  
interests  
affected.

Sec. 1083. A transfer cannot affect any interest of the transferrer which he does not own when it is made; but, if it is made with a covenant, neither the transferrer nor any person claiming under him can be permitted to take in contravention of the covenant.

N. Y. C. C., Sec. 480; "Conveyances," Sec. 33.

Incidents.

Sec. 1084. The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.

N. Y. C. C., Sec. 481.

Grant may  
inure to  
benefit of  
stranger.

Sec. 1085. A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

N. Y. C. C., Sec. 482.

## CHAPTER II.

## TRANSFER OF REAL PROPERTY.

## ARTICLE I. MODE OF TRANSFER.

## II. FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

## ARTICLE I.

## MODE OF TRANSFER.

## SECTION 1091. Requisites for transfer of real property.

1092. Written instruments, what are.

1093. Grant by married woman, how acknowledged.

1094. Power of attorney of married woman, how acknowledged.

1095. Attorney in fact, how must execute for principal.

1096. Distinction between sealed and unsealed instruments abolished. Import consideration.

1097. Want of consideration, *onus probandi*, where lies.

1098. Witness to an instrument not necessary to its validity.

SEC. 1091. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred or affected only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent, thereunto authorized by writing.

Requisites  
for transfer  
of real  
property.

N. Y. C. C., Sec. 483; "Fraudulent Conveyances and Contracts," Sec. 6.

NOTE.—"Thereunto authorized by writing," is an addition to our statute of "Conveyances" (Sec. 1), but is required by Sec. 6, "Fraudulent Conveyances," and by *Videau vs. Griffin*, 21 Cal., 389.

A transfer of real property is called a grant. At first it seemed of doubtful propriety to change from "deed" to "grant." Either word is legally sufficient. The ear is more accustomed to "deed" or "conveyance," though "grant" is familiar to common law lawyers. The New York revisers adopt "grant." Considering its derivatives, it is great economy in time and space—"grantor" and "grantee"—which can be so often used in a conveyance in place of "party of the first part" and "party of the second part" (see form of grant). These, we think, are sufficient reasons for the change from "deed" to "grant." Besides, "deed" more especially implies a seal, which has been abolished.

SEC. 1092. Written instruments, by which real property is transferred or affected, are called Real Instruments, and are—

Written  
instruments,  
what are.

1. A grant.
2. A power of attorney, authorizing the execution of a real instrument.
3. A revocation of power of attorney authorizing the execution of a real instrument.
4. An executory contract, for sale and purchase of real property.
5. An instrument creating or declaring trusts.
6. An instrument granting or reserving a power.
7. An instrument granting an easement or servitude.
8. A lease for a term of more than one year.
9. A marriage settlement contract.

[New section.]

NOTE.—Subd. 1 is based on "Conveyances," Secs. 1, 24; Subd. 2, on Sec. 27; Subd. 3, on Sec. 28; Subd. 4, on Sec. —; Subd. 7, on N. Y. C. C., Sec. 530; Subd. 8, on "Fraudulent Conveyances," Sec. 6; Subd. 9, on "Husband and Wife," Sec. 16. Mortgages, liens, etc., will be treated under their appropriate Title and declared subject to the recording laws. The standard is fixed by these sections, and other subjects will be referred to it to determine requirements and effects.

We have grouped all instruments affecting title, and called them "Real Instruments," as a matter of convenience in referring to *all* the instruments as a class. To call an assignment of mortgages a lease, and an executory contract conveyances, and their holders *purchasers*, by legislative definition ("Conveyances," Sec. 36), is simply a barbarous perversion of the words "conveyances" and "purchasers." It will require an amendment of Sec. 36, "Conveyances," to let in executory contracts as "conveyances," as their recording has been authorized since the passage of the Act concerning conveyances.

(Grant by married woman, how acknowledged.)

SEC. 1093. No estate in the real property of a married woman passes or is affected by any grant or instrument purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by Secs. 1179 and 1180.

[New section.]

N. Y. C. C., Sec. 486; "Husband and Wife," Sec. 6; "Conveyances," Secs. 19-23 (inclusive); *Morrison vs. Wilson*, 13 Cal., 494; *Landers vs. Bolton*, 26 Cal., 393.

(Power of attorney of married woman, how acknowledged.)

SEC. 1094. A power of attorney of a married woman, authorizing the execution of an instrument affecting her real property, has no validity for that purpose until ac-

known by her in the manner provided in Secs. 1179 and 1180.

[New section.] Stats. 1863, 165. General references to the subject: Mott vs. Smith, 16 Cal., 533; Dentzel vs. Waldie, 30 Cal., 138; Dow vs. Gould and Curry S. M. Co., 31 Cal., 629; Raccoulat vs. Sansevain, 32 Cal., 376.

**SEC. 1095.** When an attorney in fact executes an instrument affecting real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

Attorney in fact, how must execute for principal.

[New section.] Fisher vs. Salmon, 1 Cal., 413; Salmon vs. Hoffman, 2 Cal., 138; Videau vs. Griffin, 21 Cal., 389; Dupont vs. Wertheman, 10 Cal., 354; Hunter vs. Watson, 12 Cal., 363; Morrison vs. Bowman, 29 Cal., 337.

**SEC. 1096.** Private seals are not required for any purpose. All distinctions between sealed and unsealed instruments are abolished. A written instrument prima facie imports a consideration.

Distinction between sealed and unsealed instruments abolished. Import consideration.

[New section.] **NOTE.**—A serious, but desirable, innovation. The bar fully understand the subject. No time or space will be employed in elaborating the reasons.

**SEC. 1097.** The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

Want of consideration, onus probandi, where lies.

[New section.]

**SEC. 1098.** A witness to any instrument mentioned in Sec. 1092 is not necessary to its validity. Such witness is necessary only as a means of proving the instrument for record under Sec. 1187.

Witness to an instrument not necessary to its validity.

[New section.] **NOTE.**—It distinctly *expresses* what may be implied from other sections. Substitute for the following (Sec. 484), from the New York Civil Code (the proof and effect of non-recording are provided for in other sections): "A grant of an estate in real property, other than an estate for years or at will, must be sealed by the grantor or his agent; and if not duly acknowledged, previous to its delivery, according to the provisions of Chap. IV of this Title, its subscription and seal must be attested by at least one witness; or, if not so attested, it has no effect as against a subsequent purchaser or encumbrancer, or those claiming under him, until so acknowledged."

## ARTICLE II.

## FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

## SECTION 1102. Form of simple grant.

- 1103. No implied covenants in grants.
- 1104. Code Covenants, special and general.
- 1105. Special Code Covenants, what.
- 1106. General Code Covenants, what.
- 1107. Form of grant, with Special Code Covenants.
- 1108. Form of grant, with General Code Covenants.
- 1109. Construction of Code Covenants.
- 1110. Covenant "against prior grants made by the grantor," what.
- 1111. Covenant "against encumbrances imposed or suffered by the grantor," what.
- 1112. Covenant "of ownership," what.
- 1113. Covenant "against encumbrances," what.
- 1114. "Encumbrances" defined.
- 1115. Grantee not barred from obtaining rescission of grant, or damages for false representations.
- 1116. Code Covenants personal covenants.
- 1117. Damages for breach of certain Code Covenants, how determined.
- 1118. Damages for breach of certain other Code Covenants, how determined.
- 1119. Liabilities on other than Code Covenants depend upon what.
- 1120. What passes by grant.
- 1121. A fee simple title presumed, when.
- 1122. Any title subsequently acquired by grantor passes to grantee when.
- 1123. Grant, how far conclusive on purchasers.
- 1124. Conveyances by owner for life or for years.
- 1125. Title to highway.
- 1126. Attornment by tenant, when unnecessary. Liabilities of tenant.
- 1127. Lineal and collateral warranties.
- 1128. Attornment to a stranger.
- 1129. What easements pass with property.

Form of  
simple grant

SEC. 1102. A grant of real property may be made in substance as follows:

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth:

That the grantor grants to the grantee all the real property situated in \_\_\_\_\_, bounded and described as follows:

Witnessed by:  
E\_\_\_\_\_ F\_\_\_\_\_.

Executed by:  
A\_\_\_\_\_ B\_\_\_\_\_.

NOTE.—The following is Sec. 485 of the New York Civil Code, containing the form of grant:

"A grant of an estate in real property may be made in substance as follows:



"This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, between A. B., of \_\_\_\_\_, of the first part, and C. D., of \_\_\_\_\_, of the second part, witnesseth:

"That the party of the first part hereby grants to the party of the second part, in consideration of \_\_\_\_\_ dollars, now received, all the real property situated in \_\_\_\_\_, and bounded \_\_\_\_\_.

"Witness the hand and seal of the party of the first part.  
"A. B. [Seal]."

In England, the following form is prescribed by 8 and 9 Vic., Chap. 119:

"This indenture, made, etc., in pursuance of an Act to facilitate the conveyance of real property, between A. B. and C. D., witnesseth: That, in consideration of \_\_\_\_\_, now paid by the said C. D. to the said A. B. (the receipt whereof is hereby by him acknowledged), he, the said A. B., doth grant unto the said C. D., his heirs and assigns, forever, all that \_\_\_\_\_.

"In witness whereof, the said parties hereto have hereunto set their hands and seals."

Chancellor Kent (4 Com., 461) recommends the following:

"I, A. B., in consideration of one dollar to me paid by C. D., grant to him the lot of land [describing it].

"Witness my hand and seal," etc.

A form briefer still was held sufficient in Kentucky (Chiles vs. Conley, 2 Dana, 23).

**SEC. 1103.** No covenant is implied in any grant of an estate in real property, whether it contains express covenants or not, except as provided by the Title on *Hiring*.

No Implied covenants in grants.

N. Y. C. C., Sec. 489.

**SEC. 1104.** There are four express covenants, known as Code Covenants, pertaining to grants, and distinguished as Special Code Covenants and General Code Covenants.

Code Covenants, special and general.

[New section.]

**SEC. 1105.** Special Code Covenants are—

Special Code Covenants, what.

1. Against prior grants made by the grantor.

2. Against encumbrances imposed or suffered by the grantor.

[New section.]

NOTE.—Supplementary to Act concerning conveyances. (Stats. 1855, 171, Sec. 9.)

**SEC. 1106.** General Code Covenants are—

General Code Covenants, what

1. Of ownership

2. Against encumbrances.

[New section.]

NOTE.—See note to Sec. 1112.

**SEC. 1107.** A grant of an estate in real property, with the Special Code Covenants, may be made in substance as follows:

Form of grant, with Special Code Covenants.

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth:

That the grantor grants to the grantee all the real property situated \_\_\_\_\_, bounded and described as follows:

This grant carries with it the following Special Code Covenants:

1. Against prior grants made by the grantor.
2. Against encumbrances imposed or suffered by the grantor.

Witnessed by:

E\_\_\_\_, F\_\_\_\_.

Executed by:

A\_\_\_\_ B\_\_\_\_.

[New section.]

Form of  
grant, with  
General Code  
Covenants.

SEC. 1108. A grant of an estate in real property, with the General Code Covenants, may be made in substance as follows:

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth:

That the grantor grants to the grantee all the real property situated \_\_\_\_\_, bounded and described as follows:

This grant carries with it the following General Code Covenants:

1. Of ownership.
2. Against encumbrances.

Witnessed by:

E\_\_\_\_ F\_\_\_\_.

Executed by:

A\_\_\_\_ B\_\_\_\_.

[New section.]

Construction  
of Code  
Covenants.

SEC. 1109. When any Code Covenant is inserted in a grant, by the name and form provided in the two preceding sections, it shall be construed as a covenant, by and on the part of the grantor and his personal representatives, to and with the grantee and his personal representatives, to the effect as provided respectively in the next four sections.

[New section.]

Covenant  
"against  
prior grants  
made by the  
grantor,"  
what.

SEC 1110. A covenant "against prior grants made by the grantor" is a covenant that previous to the delivery of the grant the grantor had not granted the same property, or any right, title or interest therein, to any person other than the grantee.

[New section.]

Based on "Conveyances," Sec. 9—supplementary Act.

**SEC. 1111.** A covenant "against encumbrances imposed or suffered by grantor" is a covenant that the property is, at the time of the delivery of the grant, free from encumbrances made or suffered by the grantor or any person claiming under him.

Covenant  
"against en-  
cumbrances  
imposed or  
suffered  
by the  
grantor,"  
what.

[New section.] Based on "Conveyances," Sec. 9—supplementary Act.

**SEC. 1112.** A covenant "of ownership" is a covenant that the grantor, at the time of the delivery of the grant, is the owner in fee simple absolute of the property granted, and has peaceable possession of the same, and a perfect, recorded, fee simple title thereto, and will pay all damages arising from want of, or defect in, the possession or title, or recording, and all expenses properly incurred by the covenantee in defending or recovering such possession or title, or in perfecting and recording such title.

Covenant "of  
ownership,"  
what.

[New section.] **NOTE.**—The whole subject of covenants is substantially embraced in two propositions:

1. That the grantor owns the property in fee simple, and will defend the title.
2. That it is unencumbered.

Our "covenant of ownership" embraces all the material things included in the covenants of "seisin" and "right to convey," which are substantially the same; also, "warranty" and "quiet enjoyment," which are alike, or have only technical distinctions. There is but little difference, as between the four covenants mentioned. Some are *real* and others *personal*. Some are broken *instantly*; others on *eviction*, or acceptance of paramount title. The covenant "of ownership" also embraces "further assurance" in a "perfect, recorded, fee simple title thereto." The Code conveys "subsequently acquired title."

In *McGary vs. Hastings* (39 Cal., 360), the Court holds that a judicial eviction is not necessary to a breach of "warranty." The simple acceptance of *paramount* title is a sufficient breach; hence the distinction between "seisin" and "warranty," or "quiet enjoyment," is practically of no moment.

"Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee. If the paramount title is so asserted that he must yield to it or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach." (*McGary vs. Hastings*, 39 Cal., 367.)

"The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of *seisin* in 'ordinary language'—the right of possession is presumed as a matter of law." (*Payne and Dewey vs. Treadwell*, 16 Cal., 243; *Field*, C. J.)

The New York revisers (N. Y. C. C., Sec. 1844) establish only one rule of damage for breach of the four covenants

substantially embraced in our covenant "of ownership." We adopt that rule of damage for a breach of our one covenant "of ownership," by our Sec. —, but vary the relief by Secs. —, —, —, —, making it more elastic to reach the different conditions surrounding the parties; and in this we express what is substantially implied in a civil law transfer. See Title on *Detriment*.

Our Code Covenant "of ownership" is *independent* of the four Common Law Covenants above mentioned. If the former is used, the *Code* defines the liability to meet the requirements of the *present* instead of the *past*.

In order that no alarm may be felt at this apparent substitution of a single covenant for the four Common Law Covenants, we mention here that parties who choose can always avail themselves of the latter covenants, under Sec. 1119.

Covenant  
"against  
encum-  
brances,"  
what.

SEC. 1113 A covenant "against encumbrances" is a covenant that, at the time of the delivery of the grant, the estate granted is clear of all encumbrances.

[New section.]

"Encum-  
brances"  
defined.

SEC. 1114. The term "encumbrances" includes taxes and assessments; also, attachment, judgment and execution liens; also, vendors', mechanics' and mortgage liens; also, all other debts or demands which are liens upon real property.

[New section.]

NOTE.—Provision must be made in the Code of Civil Procedure to file notice in the Recorder's office of the levy of an execution, in order to establish a lien valid against subsequent purchasers in good faith for a valuable consideration.

Grantee not  
barred from  
obtaining  
rescission of  
grant, or  
damages for  
false repre-  
sentations.

SEC. 1115. Accepting a grant, with or without Code or Common Law Covenants, does not bar the grantee from obtaining rescission of the grant, or damages for false and fraudulent representations as to the title, location, quantity, quality and condition of the property granted, or as to the privileges connected with it, the encumbrances upon it, or the rents and profits derived from it.

[New section.]

NOTE.—This section is intended to restore the rule in *Alvarez vs. Brannan* (7 Cal., 503), reversed in *Peabody vs. Phelps* (9 Cal., 213), and reversal tolerated by *stare decisis* in *Wright vs. Carrillo* (22 Cal., 595). Attention was called to this point by J. B. Harmon, Esqr. Judge Field, who delivered the opinion in *Peabody vs. Phelps*, expresses his approval of this section. Perhaps this section ought to be placed under the Title on *Rescission*.

**SEC. 1116.** The four Code Covenants mentioned in Sec. 1104 are personal covenants, and do not run with the land. They may be transferred by the covenantee to any subsequent grantee in like manner with any other obligation, but they do not, by implication, pass with a grant.

Code Covenants personal covenants.

[New section.]

**SEC. 1117.** Damages for breach of Code Covenants "against prior grants made by the grantor" and "of ownership," specified in Subd. 1, Sec. 1105, and Subd. 1, Sec. 1106, are determined under the provisions of Secs. —, —, —, — and — (Title on *Detriment*).

Damages for breach of certain Code Covenants, how determined.

[New section.]

**SEC. 1118.** Damages for breach of Code Covenants "against encumbrances imposed or suffered by the grantor" and "against all encumbrances," specified in Subd. 2, Sec. 1105, and Subd. 2, Sec. 1106, are determined under the provisions of Sec. — (Title on *Detriment*).

Damages for breach of certain other Code Covenants, how determined.

**SEC. 1119.** The liabilities on Common Law or other than Code Covenants must depend upon the terms of such covenants, and upon the legal effect given to them by other provisions of this Code, or by the Common Law.

Liabilities on other than Code Covenants depend upon what.

[New section.]

**NOTE.**—It is intended by these Code Covenants to provide a more simple arrangement for business men in dealing with real estate. Those who desire to adopt the more intricate Common Law Covenants are left by this section with the broadest latitude. They are retained for the benefit of those who will see no good in the Code Covenants, until they are established by use and the others practically superseded.

**SEC. 1120.** A grant vests in the grantee all the actual title to the thing granted which the grantor then has, unless a different intention is expressed or is necessarily implied, and no more, except in the cases specified in Sec. 1121 and 1122.

What passes by grant.

N. Y. C. C., Sec. 479.

**SEC. 1121.** A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

A fee simple title presumed, when

[New section.]

**SEC. 1122.** When a grant of real property is expressed or presumed to be in fee simple, any title subsequently

Any title subsequently acquired by grantor passes to grantee, when.

acquired by the grantor passes, by operation of law, to the grantee or his successors, and no additional grant is necessary. This section does not apply to grants made by Sheriffs or other public officers

[New section,] Based on "Conveyances," Sec. 33..

NOTE.—The three preceding sections make simple and certain the law as to what kind of a grant will carry subsequently acquired title. Sec. — makes this section, under Title on *Mortgage*, apply to mortgages.

Grant, how far conclusive on purchasers.

SEC. 1123. Every grant of an estate in real property is conclusive against the grantor; also, against every one subsequently claiming under him, except a purchaser or encumbrancer who, in good faith, and for a valuable consideration, acquires a title or lien by an instrument [or proceeding] that is first duly recorded.

N. Y. C. C., Sec. 490.

Conveyances by owner for life or for years.

SEC. 1124. A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

N. Y. C. C., Sec. 491.

Title to highway.

SEC. 1125. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the centre thereof.

N. Y. C. C., Sec. 492.

Attornment by tenant, when unnecessary.

Liabilities of tenant.

SEC. 1126. When real property is occupied by a tenant, a grant of any estate therein, by his landlord, is valid without an attornment of the tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and the tenant is not liable to the grantee for any breach of the condition of the lease, until he has had notice of the grant.

N. Y. C. C., Sec. 493; "Conveyances," Secs. 6, 7.

Lineal and collateral warranties.

SEC. 1127. Lineal and collateral warranties, with all their incidents, and all the incidents of feudal tenures, not expressly retained by this Code, are abolished. The liability of those who acquire the real property of a decedent, by will or succession, is regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 494; "Conveyances," Sec. 8.

**SEC. 1128.** Attornment to a stranger is void, unless it is with the consent of the landlord, or in consequence of a judgment of a Court of competent jurisdiction.

Attornment  
to a stranger

"Conveyances," Sec. 7.

**SEC. 1129.** A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent, as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

What easements pass  
with property.

N. Y. C. C., Sec. 488.

## CHAPTER III.

### TRANSFERS OF PERSONAL PROPERTY.

#### ARTICLE I. MODE OF TRANSFER.

##### II. WHAT OPERATES AS A TRANSFER.

##### III. GIFTS.

#### ARTICLE I.

##### MODE OF TRANSFER.

**SECTION 1135.** When must be in writing.

1136. Transfer by sale, etc.

**SEC. 1135.** An interest in a ship, or in an existing trust, can be transferred only by operation of law, or by a written instrument, subscribed by the person making the transfer, or by his agent.

When must  
be in writing

This provision is intended to settle a doubtful question. The uniform language of the authorities is, that a bill of sale is the customary and proper mode of transfer. Agreements for sale are regulated by the Title on *Sale*.

N. Y. C. C., Sec. 495.

**SEC. 1136.** The mode of transferring other personal property by sale is regulated by the Title on that subject, in Division Third of this Code.

Transfer by  
sale, etc.

N. Y. C. C., Sec. 496.

## ARTICLE II.

## WHAT OPERATES AS A TRANSFER.

SECTION 1140. Transfer of title under sale.

1141. Transfer of title under executory agreement for sale.

1142. When buyer acquires better title than seller has.

Transfer of  
title under  
sale.

SEC. 1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.

N. Y. C. C., Sec. 497.

Transfer of  
title under  
executory  
agreement  
for sale.

SEC. 1141. Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon *Offer of Performance*.

N. Y. C. C., Sec. 498.

When buyer  
acquires  
better title  
than seller  
has.

SEC. 1142. Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind and does rescind the transfer made by him.

N. Y. C. C., Sec. 499.

## ARTICLE III.

## GIFTS.

SECTION 1146. Gifts defined.

1147. Gift, how made.

1148. Gift not revocable.

1149. Gift in view of death, what.

1150. When gift presumed to be in view of death.

1151. Revocation of gift in view of death.

1152. Effect of will upon gift.

1153. When treated as legacy.

Gifts defined

SEC. 1146. A gift is a transfer of personal property, made voluntarily and without consideration.

N. Y. C. C., Sec. 500.



**SEC. 1147.** A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

Gift, how made.

N. Y. C. C., Sec. 501.

**SEC. 1148.** A gift, other than a gift in view of death, cannot be revoked by the giver.

Gift not revocable.

N. Y. C. C., Sec. 502.

**SEC. 1149.** A gift in view of death is one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver.

Gift in view of death, what.

N. Y. C. C., Sec. 503.

**SEC. 1150.** A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

When gift presumed to be in view of death.

N. Y. C. C., Sec. 504.

**SEC. 1151.** A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

Revocation of gift in view of death

N. Y. C. C., Sec. 505.

**SEC. 1152.** A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

Effect of will upon gift.

N. Y. C. C., Sec. 506.

**SEC. 1153.** A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver.

When treated as legacy.

N. Y. C. C., Sec. 507.

## CHAPTER IV.

### RECORDING TRANSFERS OF REAL PROPERTY.

#### ARTICLE I. WHAT MAY BE RECORDED.

#### II. PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

#### III. EFFECT OF RECORDING, OR THE WANT THEREOF.

#### IV. MODE OF RECORDING.

## ARTICLE I.

## WHAT MAY BE RECORDED.

SECTION 1159. Letters patent may be recorded without acknowledgment.  
Effect of recording.

1160. What kind of instruments may be recorded.

1161. Instruments evidencing title declared by judgment, recorded.

1162. What shall not be recorded.

1163. Instruments proved by other than subscribing witnesses, when and how recorded.

1164. Instruments executed under power of attorney, when deemed recorded.

1165. Powers of attorney, how revoked.

Letters patent may be recorded without acknowledgment.

Effect of recording.

SEC. 1159. Letters patent from the United States or from the State of California, duly executed and authenticated pursuant to existing law, granting real property in this State, may be recorded without acknowledgment or further proof. Such recording shall have like effect as the recording of instruments mentioned in the next section.

[New section.] "Conveyances," Sec. 18.

What kind of instruments may be recorded.

SEC. 1160. Real instruments mentioned in Sec. 1092 may be recorded when acknowledged, or proved and certified as provided in this chapter.

[New section.] For construction of registration laws generally, see: *Woodworth vs. Gutzman*, 1 Cal., 203; *Call vs. Hastings*, 3 Cal., 179; *Mesick vs. Sunderland*, 6 Cal., 279; *Dennis vs. Burnett*, 6 Cal., 670; *Bird vs. Denison*, 7 Cal., 297; *Chamberlain vs. Bell*, 7 Cal., 292; *Hunter vs. Mason*, 12 Cal., 363; *Pixley vs. Huggins*, 15 Cal., 127; *Smith vs. Dall*, 13 Cal., 510; *Jones vs. Martin*, 16 Cal., 165; *McCabe vs. Grey*, 20 Cal., 509; *Wallace vs. Moody*, 26 Cal., 387; *Fogarty vs. Sawyer*, 23 Cal., 570; *Page vs. Rogers*, 31 Cal., 293.

Instruments evidencing title declared by judgment, recorded.

SEC. 1161. In judgments of partition, and in judgments determining title to real property, the Court, at the time of rendering judgment, or at any time thereafter, may require the respective parties, or a Commissioner, to make and acknowledge such grant, for record, as will enable them to have recorded, in the land records, the evidence of their respective titles, as shown by the judgments.

[New section.]

What shall not be recorded.

SEC. 1162. Instruments not acknowledged, or proved and certified as required by this chapter, and instruments

not authorized by law to be recorded, shall not be transcribed into the books of record. If so transcribed, the transcription does not impart notice, or have any legal effect.

[New section.] *Raccoullat vs. Sansevain*, 32 Cal., 376, 450; *Minn vs. O'Connor*, 27 Cal., 238; *Smith vs. Brannan*, 13 Cal., 107; *Hastings vs. Vaughan*, 5 Cal., 305; *Mesick vs. Sunderland*, 6 Cal., 297; *Wolf vs. Fogarty*, 6 Cal., 224.

NOTE.—The first clause of this section establishes a positive duty, for the violation of which the Recorder is liable to punishment under provisions in the Penal Code. The last clause *expresses* what arises from *implication* under the preceding section, as established by numerous adjudications. It is deemed best to give clear expression to the law guarding the public records against unauthorized registration.

SEC. 1163. An instrument proved by other than subscribing witnesses, and certified pursuant to Sec. 1189, may be recorded in the proper office, if the original is at the same time deposited therein to remain for public inspection, but not otherwise.

Instruments proved by other than subscribing witnesses, when and how recorded.

N. Y. C. C., Sec. 510; "Conveyances," Sec. 10.

SEC. 1164. An instrument executed by an attorney in fact, and filed for record, or transcribed into the proper books of record, shall not be deemed recorded until the power of attorney authorizing the execution of the instrument is also recorded in the same office. They are deemed one instrument, though they may be recorded at different times.

Instruments executed under power of attorney, when deemed recorded.

[New section.]

SEC. 1165. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.

Powers of attorney, how revoked

[New section.] "Conveyances," Sec. 28; N. Y. C. C., Sec. 552.

## ARTICLE II.

## PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

**SECTION 1169.** By whom acknowledgments may be taken in this State.

1170. Same.

1171. By whom taken without the State.

1172. By whom taken without the United States.

1173. Deputy can take acknowledgment.

1174. Requisites for acknowledgments.

1175. Officer must indorse certificate.

1176. Form of certificate.

1177. Attorney in fact must exhibit to officer, what.

1178. Form of certificate when acknowledgment is by attorney in fact.

1179. Acknowledgment by married woman.

1180. Form of certificate when acknowledgment is by married woman.

1181. Conveyance by married woman, effect of.

1182. Interpreter may be employed.

1183. Proof of execution, how made.

1184. Witness must be personally known to officer.

1185. Witness shall prove, what.

1186. Certificate of officer shall be indorsed thereon, setting forth what.

1187. Handwriting may be proved, when.

1188. Evidence must prove, what.

1189. Certificate of officer.

1190. Officers authorized to do certain things.

1191. Officers must affix their signatures.

1192. When instrument is improperly certified, party may have action to correct error.

1193. In certain cases, parties interested entitled to action in Court to obtain judgment of proof of an instrument for record.

1194. Conveyances heretofore made to be governed by then existing laws.

1195. Recording, and as evidence, to be governed by then existing laws.

1196. Statutes curing acknowledgments, etc., preserved.

By whom  
acknowledg-  
ments may  
be taken in  
this State.

**SEC. 1169.** The proof or acknowledgment of an instrument may be made at any place within this State, before a Justice or Clerk of the Supreme Court.

N. Y. C. C., Sec. 516; "Conveyances," Sec. 4.

Same.

**SEC. 1170.** The proof or acknowledgment of an instrument may be made, in this State, within the city, county or district for which the officer was elected or appointed, before either—

1. A Judge or Clerk of a Court of record; or,
2. A Mayor or Recorder of a city; or,

- 3. A Justice of the Peace; or,
- 4. A County Recorder; or,
- 5. A Notary Public.

N. Y. C. C., Sec. 517; "Conveyances," Sec. 4; Hopkins vs. Delaney, 8 Cal., 83; Ingoldsby vs. Juan, 12 Cal., 564; Muller vs. Boggs, 25 Cal., 175; Kimball vs. Semple, 25 Cal., 440.

SEC. 1171. The proof or acknowledgment of an instrument may be made without this State, but within the United States, and within the jurisdiction of the officer, before either—

By whom  
taken with-  
out the State

- 1. A Judge or Clerk of any Court of record of the United States; or,
- 2. A Judge or Clerk of any Court of record of any State or Territory; or,
- 3. A Commissioner appointed by the Governor of this State for that purpose, pursuant to special statutes; or,
- 4. A Notary Public.

N. Y. C. C., Sec. 518; "Conveyances," Sec. 4; Lord vs. Sherman, 2 Cal., 498.

SEC. 1172. The proof or acknowledgment of an instrument may be made without the United States, before either—

By whom  
taken with-  
out the  
United  
States.

- 1. A Minister Plenipotentiary, or Minister Extraordinary, or *Chargé d'Affaires* of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
- 2. A Consul or Vice Consul of the United States, resident in that country; or,
- 3. A Judge of a Court of record of the country where the proof or acknowledgment is made; or,
- 4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes; or,
- 5. A Notary Public.

N. Y. C. C., Sec. 519; "Conveyances," Sec. 4; Mott vs. Smith, 16 Cal., 533; McMinn vs. O'Connor, 27 Cal., 238.

SEC. 1173. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

Deputy can  
take  
acknowledg-  
ment.

"Conveyances," Sec. 4; Muller vs. Boggs, 25 Cal., 175.

Requisites  
for acknowl-  
edgments.

SEC. 1174. The acknowledgment of an instrument must not be taken unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument.

N. Y. C. C., Sec. 520; "Conveyances," Sec. 6; *Kelsey vs. Dunlap*, 7 Cal., 160; *Wolf vs. Fogarty*, 6 Cal., 224.

Officer must  
indorse  
certificate.

SEC. 1175. An officer taking the acknowledgment of an instrument must indorse thereon a certificate, signed by himself, stating the fact of acknowledgment and that the person making the same was known to the officer to be the person whose name is subscribed to the instrument as a party, or was proved to be such by the oath or affirmation of a credible witness, whose name shall be inserted in the certificate. If the person is a married woman or an attorney in fact, the certificate shall contain such additional facts as are required by Secs. 1177 and 1178.

[New section.] Based on Sec. 7, "Conveyances;" *Kelsey vs. Dunlap*, 7 Cal., 160; *Hopkins vs. Delaney*, 8 Cal., 85; *Bryan vs. Ramariz*, 8 Cal., 461; *Henderson vs. Grewell*, 8 Cal., 584; *Fogarty vs. Findey*, 10 Cal., 239; *Touohard vs. Crow*, 20 Cal., 150; *Stark vs. Barrett*, 15 Cal., 361; *Colton vs. Seavy*, 22 Cal., 496; *Kimball vs. Semple*, 25 Cal., 440; *Jansen vs. Cahill*, 22 Cal., 563; *McMinn vs. O'Conner*, 27 Cal., 328.

Form of  
certificate.

SEC. 1176. The certificate must be substantially in the following form:

STATE OF —, }  
County of —, } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name of the office], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument, and acknowledged to me that he [or they] executed the same.

[Name of officer and name of office.]

[New section.]

Attorney in  
fact must  
exhibit to  
officer, what.

SEC. 1177. When an instrument is subscribed in the name of the principal, by an attorney in fact, who desires to acknowledge the same, he must exhibit to the officer—

1. A power of attorney, duly acknowledged or proved

for recording, authorizing the execution of the instrument; or,

2. If recorded, the original or a certified copy of the record thereof.

[New section.]

**SEC. 1178.** The certificate of acknowledgment by an attorney in fact must be substantially in the following form :

Form of certificate when acknowledgment is by attorney in fact.

STATE OF —, }  
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name of the office], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument as the attorney in fact of —, and exhibited to me a power of attorney duly acknowledged [or proved, if so], purporting to be subscribed by said —, and acknowledged to me that — subscribed the name of — thereto as principal, and his own name as attorney in fact.

[Name of officer and name of office.]

[New section.] Goode vs. Smith and Wife, 13 Cal., 83; Hopkins vs. Delaney, 8 Cal., 85; Jansen vs. McCahill and Wife, 22 Cal., 563.

**SEC. 1179.** The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband, nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

Acknowledgment by married women.

[New section.] "Conveyances," Sec. 23; N. Y. C. C., Sec 521; Jansen vs. McCahill, 22 Cal., 563; Kendall vs. Miller, 9 Cal., 591; Pease vs. Barbiers, 10 Cal., 436.

**SEC. 1180.** The certificate of the acknowledgment of a married woman must be substantially in the following form :

Form of certificate when acknowledgment is by married woman.

STATE OF —, }  
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name

of the office], personally appeared ———, known to me [or proved to me on the oath of ———] to be the person whose name is subscribed to the within instrument, described as a married woman; and, upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

[Name of officer and name of office.]

[New section.]

Conveyance  
by married  
woman.  
effect of.

SEC. 1181. A conveyance or other instrument affecting real property, when acknowledged by a married woman, has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last two sections, but has no validity until so acknowledged.

N. Y. C. C., Sec. 522.

Interpreter  
may be  
employed.

SEC. 1182. An interpreter may be employed and sworn by the officer, to interpret, in taking acknowledgment or proof of an instrument, when the parties acknowledging or the witnesses proving do not understand the English language. An interpreter is prima facie presumed to have been employed when necessary, and the fact need not be stated in the certificate.

[New section.]

Proof of  
execution,  
how made.

SEC. 1183. Proof of the execution of an instrument, when not acknowledged, may be made, either—

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in Sec. 1187.

[New section.] “Conveyances,” Sec. 10—modified.

Witness  
must be  
personally  
known to  
officer.

SEC. 1184. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

[New section.] “Conveyances,” Sec. 11—modified.

Witness  
shall prove,  
what.

SEC. 1185. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such



person executed it, and that the witness subscribed his name thereto as a witness.

[New section.] "Conveyances," Sec. 12—modified.

Sec. 1186. The officer taking the proof must indorse a certificate on the instrument, which must set forth—

Certificate of officer shall be indorsed thereon, setting forth what.

1. If proved by the party: the facts required to have been shown in the certificate of acknowledgment of the party, if it had been taken.

2. If proved by the subscribing witness: that such witness was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a witness, or was proved to be such by the oath or affirmation of a witness whose name must be inserted in the certificate.

3. The proof given by the witness of the execution of the instrument, and of the facts that the person whose name is subscribed to it as a party is the party who executed the same, and that the witness subscribed his name to the instrument as a witness.

[New section.] "Conveyances," Sec. 13—modified; *Kelsey vs. Dunlap*, 7 Cal. 160; *Fogarty vs. Finlay*, 10 Cal., 239; *Whitney vs. Arnold*, 10 Cal., 531.

Sec. 1187. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, in the following cases:

Handwriting may be proved, when

1. When the parties and all the subscribing witnesses are dead; or,

2. When the parties and all the subscribing witnesses are non-residents of the State and refuse to appear and make proof before the proper officer in the jurisdiction where they reside; or,

3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,

4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence, in attempting to serve the subpoena or attachment; or,

5. In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his appearance.

[New section.] Stats. 1851, 521; "Conveyances," Sec. 17—modified; *Landers vs. Bolton*, 26 Cal., 393.

Evidence  
must prove,  
what.

SEC. 1188. The evidence must satisfactorily prove to the officer the following facts :

1. One or more of the conditions mentioned in the preceding section ; and,

2. That a witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine ; and,

3. That a witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine.

[New section.] “ Conveyances,” Sec. 15—modified.

Certificate  
of officer.

SEC. 1189. The officer shall indorse on the instrument his certificate, stating the precedent fact contained in the subdivision of Sec. 1187 upon which is founded the right to prove the execution of the instrument by other than subscribing witnesses ; also, the facts required to be proved in the preceding section.

[New section.] “ Conveyances,” Sec. 5, in substance.

Officers  
authorized  
to do certain  
things.

SEC. 1190. Officers authorized to take the proof of instruments, are authorized—

1. To administer oaths or affirmations, as prescribed in Sec. 2093, CODE OF CIVIL PROCEDURE.

2. To issue subpoena, as prescribed in Sec. 1986, CODE OF CIVIL PROCEDURE.

3. To punish for contempt, as prescribed in Secs. 1991, 1993, 1994, CODE OF CIVIL PROCEDURE.

The civil damages and forfeiture to the party aggrieved, are prescribed in Sec. 1992, CODE OF CIVIL PROCEDURE

NOTE.—The sections above cited need to be examined, to make sure that they are ample enough for the purpose. The remedies in that Code and in the Conveyance Act are substantially duplicate.

Officers must  
affix their  
signatures.

SEC. 1191. Officers taking and certifying acknowledgments or proof of instrument for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their office and the city, county or district within which they have jurisdiction ; also, their seals of office, if, by the laws of the State or country where the acknowledgment or proof is taken, or by

authority of which they are acting, they are required to have official seals.

[New section.]      *Hastings vs. Vaughan*, 5 Cal., 315; *Mott vs. Smith*, 16 Cal., 533; *Ingoldsby vs. Juan*, 12 Cal., 564; *Touchard vs. Crow*, 20 Cal., 150.

**SEC. 1192.** When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the District Court, under the CODE OF CIVIL PROCEDURE, to obtain a judgment correcting the certificate. A copy of such judgment annexed to the instrument has the same effect as an acknowledgment certified under this chapter.

When instrument is improperly certified, party may have action to correct error.

[New section.]      **NOTE.**—This section is a substitute for special proceedings before the County Judge, provided for in seven sections of the Act of 1860 (Stats. 1860, 177).

**SEC. 1193.** Any person interested under an instrument entitled to be proved for record, may institute an action in the District Court, under the CODE OF CIVIL PROCEDURE, against the proper parties, to obtain a judgment proving such instrument. The mode of proceeding and the rules of evidence are the same as in other civil actions. A copy of the judgment, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged.

In certain cases, parties interested entitled to action in Court to obtain judgment of proof of an instrument for record.

[New section.]      **NOTE.**—This is an ample concurrent remedy, which would be used only in cases where it is difficult to make the proof under the strict statutory mode.

**SEC. 1194** The legality of the execution, acknowledgment, proof, form or record of any conveyance or other instrument heretofore made, executed, acknowledged, proved or recorded, shall not be affected by anything contained in this chapter, but shall depend for its validity and legality upon the laws then existing.

Conveyances heretofore made to be governed by then existing laws.

“Conveyances,” Sec. 42.

**SEC. 1195.** All conveyances of real property heretofore made and acknowledged, or proved according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this chapter.

Recording, and as evidence, to be governed by then existing laws.

“Conveyances,” Sec. 41.

Statutes  
curing  
acknowledg-  
ments, etc.,  
preserved.

**SEC. 1196.** The repeal or superseding of statutes, validating or curing void or defective proof or acknowledgment, or recording of an instrument, does not abolish or alter the effects of such statutes, but they continue in like manner and extent as if the statutes were not repealed or superseded.

[New section.] **NOTE.**—Based on a large number of curative statutes.

### ARTICLE III.

#### EFFECT OF RECORDING.

##### **SECTION 1200. Purchaser for value.**

- 1201. Unrecorded instrument valid between the parties.
- 1202. Unrecorded instrument, when void.
- 1203. Priority of record.
- 1204. Purchase from subsequent grantee without notice of prior unrecorded grant, valid.
- 1205. When prior and subsequent grant are both recorded, a vendee under the latter takes with notice of the former.
- 1206. Holder of recorded instrument is presumed bona fide purchaser as against whom.
- 1207. Actual notice, etc., evidence of bad faith.
- 1208. Circumstances to rebut presumption.
- 1209. Unrecorded instruments void as against encumbrances.
- 1210. Sheriff's grant has relation to encumbrance as muniment of title.
- 1211. Sheriff's grants and certificates of purchase subject to this article.
- 1212. Priority of record gives priority of right.
- 1213. Action in District Court to quiet title in certain cases.

Purchaser  
for value.

**SEC. 1200.** A purchaser for value of real property is one who acquires an interest in property under a real instrument mentioned in Sec. 1092, and for which he has paid a valuable consideration. A mortgagee or encumbrancer, and his assignees, are also purchasers for value when the mortgage or encumbrance is executed or created to secure bona fide obligations.

[New section.] **NOTE.**—There are so many places where this term "purchasers for value," occurs in the Code, that it seems necessary to extend its meaning to embrace all things necessary under Sec. 1092, and mortgages, contrary to the intention manifested in note to Sec. 1092. The provisions of this article are applied to mortgages by Sec. ——. See Title on *Mortgages*.

**SEC 1201.** An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.

Unrecorded instrument valid between the parties.

[New section.] Based on "Conveyances," Secs. 24, 25, 26; Landers et al. vs. Bolton, 26 Cal., 393.

**SEC. 1202.** An unrecorded instrument is void as against an instrument acquired in good faith and for value, properly acknowledged, or proved, certified and recorded, affecting the same property and derived from the same source.

Unrecorded instrument, when void.

[New section.] Based on "Conveyances," Secs. 24, 25, 26; Clark vs. Foy, 20 Cal.

**SEC. 1203.** A prior instrument affecting real property, recorded after the recording of a subsequent instrument affecting the same property, and derived from the same source, must not be deemed recorded as against the subsequent instrument.

Priority of record.

[New section.]

**SEC. 1204.** A person acquiring an instrument in good faith and for value, of a person holding under a recorded instrument, takes the right or property, as against any claims of another holding under a prior unrecorded instrument affecting the same property and derived from the same source.

Purchase from subsequent grantee without notice of prior unrecorded grant, valid.

[New section.] Mahoney vs. Middleton, Supreme Court of Cal., Jan. Term, 1871.

**SEC. 1205.** When a prior instrument is recorded subsequently to the recording of a subsequent instrument, a person taking from the holder of the subsequent instrument, takes with notice of all facts and conditions existing between the holders of the prior and subsequent instruments as to good faith and valuable consideration.

When prior and subsequent grant are both recorded, a vendee under the latter takes with notice of the former.

[New section.]

**SEC. 1206.** The holder of a recorded instrument is presumed, as against the holder of an unrecorded instrument, to be a holder in good faith, but the former must affirmatively show a valuable consideration.

Holder of recorded instrument is presumed bona fide purchaser as against whom.

[New section.] **NOTE.**—This modifies the rule in Lander vs. Bolton (26 Cal., 393), and in Long vs. Dollarhide (24 Cal., 218), but is sustained by Basset vs. Norsworthy (2 Leading Cases in Equity, 84).

Actual notice, etc., evidence of bad faith.

SEC. 1207. Actual notice of the unrecorded instrument, by the holder of the recorded instrument subsequently executed, is prima facie evidence of bad faith.

[New section.]

Circumstances to rebut presumption.

SEC. 1208. Possession of the premises under the unrecorded instrument, or inadequacy of consideration for the recorded instrument, are circumstances tending to show actual notice or bad faith, and to rebut the presumption mentioned in Sec. 1206.

[New section.]

Fair vs. Stevenot, 29 Cal., 486 ; Stafford vs. Lick, 7 Cal., 489 ; Hunter vs. Watson, 12 Cal., 376 ; Lastrade vs. Baith, 19 Cal., 676 ; Dutton vs. Wauschaner, 21 Cal., 627 ; Lander vs. Bolton, 26 Cal., 393.

Unrecorded instruments void as against encumbrances.

SEC. 1209. An unrecorded instrument is also void as against encumbrances acquired in good faith and for value, and duly authenticated and recorded by authority of any existing law.

[New section.]

"Conveyances," Secs. 24, 25, 26, amplified to cover all classes of liens. Hunter vs. Watson, 12 Cal., 363.

Sheriff's grant has relation to encumbrance as muniment of title.

SEC. 1210. A grant made by a Sheriff, or other officer or person, to satisfy an encumbrance on real property, relates back to the time of creating or recording the encumbrance, and both the encumbrance and grant are muniments of the same title.

[New section.]

Sheriff's grants and certificates of purchase subject to this article.

SEC. 1211. Sheriffs' grants or certificates of purchase are subject to the provisions of this article, and are governed by the same rules with respect to unrecorded instruments as are other real instruments.

[New section.]

Hunter vs. Watson, 12 Cal., 363.

Priority of record gives priority of right.

SEC. 1212. Priority of record establishes priority of right, subject to the conditions of good faith and valuable consideration.

[New section.]

Based on "Conveyances," Sec. 26.

NOTE.—Instruments, "to operate as notices to third persons," must be recorded. ("Conveyances," Sec. 24, 1850.)

Instruments "shall, from the time of filing, impart notice to all persons," and all "subsequent purchasers and mortgagees shall be deemed to purchase with notice." ("Conveyances," Sec. 25, 1850.)

The words "all persons" mean subsequent "purchasers and mortgagees." (McCabe vs. Gray, 20 Cal., 509.)

Sec. 25 was amended February, 1864 (Stats. 1864, 85), so as to read "and subsequent purchasers, mortgagees and *lien holders* shall be deemed to purchase and take with notice."

What kind of *lien holders*? Was it the intention to protect encumbrancers and *lien holders* of all kinds against unrecorded deeds? It would seem so, yet the purpose is but half expressed. The new section (26) has not been amended so as to declare the further and final effect of want of recording as against *lien holders*. A *lien holder* is not a "purchaser," within Sec. 26, nor the *lien* a "conveyance," within Sec. 36. There is unnecessary incongruity in our laws upon this subject.

There are three classes protected against unrecorded instruments:

1. Purchasers and mortgagees in good faith, under Secs. 26 and 36, "Conveyances."
2. *Lien holders* (doubtful) under Sec. 25, as amended.
3. Creditors, in cases of transfer of personal property without delivery, etc., under Sec. 15, "Fraudulent Conveyances and Contracts," *conclusively fraudulent against creditors*.

Why should one effect be given to an unrecorded deed and another to a sale of undelivered property?

There is no good reason why all these transfers, whether of real or personal property, where certain evidences of them are required to be public in order to protect the public, should not have the same effect—all void against *creditors, lien holders, mortgagees* and *purchasers*, or all void as against any of them which might be specified.

Uniformity is most desirable. In Virginia, and in some other States, an unrecorded deed is void as against *creditors*.

We do not propose to change the law in this particular, but we do propose to give certainty by making an unrecorded instrument void as against subsequent purchasers and *encumbrancers*, and leave the Legislature to further consider the question of uniformity, as between transfers of real and personal property, as to unrecorded real instruments and undelivered personal property.

The intention of this article is, to make the public records the evidence of ownership of real property, and to protect, equally and by the same rules, purchasers and mortgagees in good faith and for value; also, *creditors*, after acquiring a specific lien by attachment or levy of execution, or a general lien by docketed judgment; also, mechanics' liens and others.

Sec. 1213. Any person interested in real property may have an action in the District Court against any or all persons claiming right or title to such property in contravention of his claim of title, whether such claim

Action in District Court to quiet title in certain cases

arises from the effect of recording laws or otherwise, or whether he is in or out of possession of the property. In such case, the person in possession must be made a party.

[New section.]

NOTE.—To be transferred to the Code of Civil Procedure.

#### ARTICLE IV.

##### MODE OF RECORDING.

SECTION 1217. In what office.

1218. Instrument, when deemed recorded.

1219. Books of record.

1220. Duties of Recorder.

1221. Transfers of vessels.

In what  
office.

SEC. 1217. Instruments entitled to be recorded under this chapter must be recorded by the County Recorder of the county in which the real property affected thereby is situated.

N. Y. C. C., Sec. 512.

Instrument,  
when deem-  
ed recorded.

SEC. 1218. An instrument is deemed recorded when duly acknowledged or proved, certified and deposited in the Recorder's office, with the proper officer, and by him filed for record, by noting thereon such filing, with the minute, hour, day and year thereof, and subscribing the same.

[New section.]

Based on "Recorder of County," Secs. 16, 17.

Books of  
record.

SEC. 1219. Grants, absolute in terms, and not intended as mortgages, or as securities in the nature of mortgages, are to be recorded in one set of books, and mortgages and securities in another.

N. Y. C. C., Sec. 513.

Duties of  
Recorder.

SEC. 1220. The duties of County Recorders, in respect to recording instruments, are prescribed by the POLITICAL CODE.

Transfers of  
vessels.

SEC. 1221. The mode of recording transfers of ships registered under the laws of the United States, is regulated by Acts of Congress.

N. Y. C. C., Sec. 515; Stats. 1868, 111.



## CHAPTER V.

## UNLAWFUL TRANSFERS.

**SECTION 1227.** Certain instruments void against purchasers, etc.

1228. Not void against purchaser having notice, unless fraud is mutual.

1229. Power to revoke, when deemed executed.

1230. Same.

1231. Other provisions.

**SEC. 1227.** Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof.

Certain instruments void against purchasers, etc.

N. Y. C. C., Sec. 535; "Fraudulent Conveyances and Contracts," Sec. 1.

**SEC. 1228.** No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

Not void against purchaser having notice, unless fraud is mutual.

N. Y. C. C., Sec. 536; "Fraudulent Conveyances and Contracts," Sec. 2.

**SEC. 1229.** Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of or charge upon the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

Power to revoke, when deemed executed.

N. Y. C. C., Sec. 537; "Fraudulent Conveyances and Contracts," Sec. 3.

**SEC. 1230.** Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the

Same.

power is deemed to be executed as soon as he is entitled to execute it.

N. Y. C. C., Sec. 538 ; "Fraudulent Conveyances and Contracts," Sec. 5.

Other provisions.

Sec. 1231. Other provisions concerning unlawful transfers are contained in Part II, Division Fourth, of this Code, concerning the special relations of debtor and creditor.

N. Y. C. C., Sec. 541.

## TITLE V.

### HOMESTEADS.

#### CHAPTER I. GENERAL PROVISIONS RELATING TO HOMESTEADS.

##### II. THE HOMESTEAD OF THE HEAD OF A FAMILY.

##### III. THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.

### CHAPTER I.

#### GENERAL PROVISIONS RELATING TO HOMESTEADS.

Section 1237. Homestead, what constitutes, and its exemption.

1238. Homestead, from what property may be taken.

1239. Debts from which homestead is not exempt.

1240. Conveyances, mortgages, etc., how executed, acknowledged and recorded.

1241. Homestead, how abandoned.

1242. Proceedings when homestead is claimed to exceed the amount of exemption.

1243. How property disposed of on report of appraisers.

1244. Fees, when the claimant to pay and when the judgment creditor.

1245. Official duties, how enforced.

1246. Who may acquire homesteads, and of what value.

Homestead, what constitutes and its exemption.

Sec. 1237. The homestead consists of a quantity of land or town lots, with the dwelling house or portion of a dwelling house thereon, and its appurtenances, selected and recorded as in this Title provided, and is not subject to sale under execution or any final process from any Court for any debt or liability contracted or incurred by

the party entitled thereto, and who selected and recorded the same, except as hereinafter provided.

Const., Art. XI, Sec. 15; Stats. 1851, 296, Sec. 1; 1860, 311, Sec. 1; Estate of Delaney, 37 Cal., 173.

SEC. 1238. The homestead may be selected by, or ad-measured to, the claimant, from any property, the title to which is vested in the claimant or husband of the claimant, or from community property of the husband and wife, or from any property owned by the claimant or husband of the claimant, as joint tenant, tenant in common or coparcener, to the extent of such interest, when the claimant, or the claimant's husband, is in exclusive occupation of such property or the portion claimed as a homestead. Being selected and recorded as a homestead does not in any manner affect or prevent partition of the property among the owners in any method authorized by law.

Homestead, from what property may be taken.

Stats. 1867-8, 116, Secs. 1, 3.

SEC. 1239. The homestead is liable for and subject to sale under execution or other process, for the payment of the debts and liabilities following, to wit:

Debts from which homestead is not exempt.

1. Mechanics', laborers' and vendors' liens, legally obtained.
2. Mortgages for the purchase money.
3. Mortgages for money loaned, when executed and acknowledged by the husband and wife, and recorded as provided in this chapter.
4. Mortgages executed and acknowledged by the debtor alone, who has no wife, or whose wife was a non-resident of the State at the time, or before, the homestead was recorded.
5. A judgment rendered and recorded against a debtor before he recorded his homestead.
6. A debt or liability contracted or assumed before filing his homestead, by one being neither a husband nor wife, nor the head of a family.

[New section.] Stats. 1851, 296, Sec. 2; 1860, 89, Sec. 9; 1860, 311, Sec. 2; 1862, 519, Sec. 2; Sears vs. Dixon, 33 Cal., 326; Rix vs. Henry, 7 Cal., 89; Himmelman vs. Schmidt, 23 Cal., 117.

SEC. 1240. No alienation, sale, conveyance, or mortgage upon the homestead, is valid or effectual for any pur-

Conveyances  
mortgages,  
etc., how  
executed, ac-  
knowledged  
and recorded

pose unless executed and acknowledged by the owner and also by his wife, if he has one resident in the State, in the manner provided for her execution of conveyances of her separate real property; and the instrument is recorded in the Recorder's office where the homestead is recorded, and an abandonment of the homestead claim is contained in such instrument or separately made for that purpose and recorded in the same Recorder's office.

Stats. 1851, 296, Sec. 2; 1860, 311, Sec. 2; 1862, 519, Sec. 2.

Homestead,  
how aban-  
doned.

SEC. 1241. No homestead is abandoned unless in writing embodied in a deed, mortgage, or other conveyance thereof, or in an abandonment in writing, duly executed, acknowledged and recorded in the Recorder's office where the homestead declaration or title is recorded.

Stats. 1851, 296, Sec. 2; 1862, 519, Sec. 2.

Proceedings  
when home-  
stead is  
claimed to  
exceed the  
amount of  
exemption.

SEC. 1242. When an execution is issued and levied upon a homestead, and the execution creditor makes affidavit before the County or District Judge of the county where the homestead is situated, that the cash value thereof, to the best of his knowledge and belief, exceeds the value of the homestead exemption to which the judgment debtor is entitled, the Judge must, after two days' notice to the judgment debtor of the making of such affidavit, appoint three disinterested and competent persons appraisers, to estimate and report the value of the homestead; who, after being sworn, must proceed to view and appraise the same, and report to the Judge the value thereof; and if the value exceeds the amount of the homestead exemption to which such person is entitled, whether it can be so divided as to leave so much of the homestead as amounts to the exemption, without material injury.

Stats. 1851, 296; Sec. 3; 1860, 312, Sec. 3.

How prop-  
erty disposed  
of on report  
of appraisers

SEC. 1243. If it appears that the premises cannot be thus divided, and that the value thereof exceeds the exemption allowed by this Title, he must order the entire premises to be sold, and out of the proceeds the sum to which the judgment debtor is entitled to as a homestead exemption to be paid to the defendant in the execution, and the excess to be applied to the satisfaction of the execution. No bid must be received by the officer mak-

ing the sale under the amount of homestead exemption to which the judgment debtor is entitled; and when the execution is against a husband whose wife is living, the Judge may, in his discretion, direct five thousand dollars of the purchase money to be deposited in Court, to be paid out only upon the joint receipt of the husband and wife. Such purchase money possesses all the protection against legal process and the voluntary disposition of the husband, as did the original homestead premises.

Stats. 1851, 296, Sec. 3; 1860, 312, Sec. 3.

SEC. 1244. For every homestead appraised or admeasured in accordance with the provisions of this Title, the homestead claimant must pay to the county General Fund, for use of the county, the sum of ten dollars, and file the receipt therefor with the County Auditor; and must pay each appraiser three dollars per day for the time necessarily employed. If in an appraisement, or at a sale had at request of a judgment creditor, as provided in the two preceding sections, the property does not exceed in value the amount of homestead exemption to which the judgment debtor is entitled, the judgment creditor must pay all costs of the proceedings.

Fees, when the claimant to pay and when the judgment creditor.

Stats. 1860, 89, Sec. 10.

SEC. 1245. The homestead claimant may, by proper process, compel the County Judge to act in performing the duties herein enjoined; and the County Judge may enforce his orders and appointments by due process, and fine as for contempt.

Official duties, how enforced.

[New section.]

SEC. 1246. Homesteads may be acquired in the manner provided in this Title, by the persons and of the value following:

Whomay acquire homesteads, and of what value.

1. By the husband and wife, or either of them, or other "head of a family," not exceeding in value five thousand dollars.

2. By any other person, who is either a resident citizen of this State or who can become such, not exceeding in value one thousand dollars.

[New section.] Stats. 1851, 296, Sec. 1; 1860, 87, Sec. 1; 311, Sec. 1; 1862, 519, Sec. 1.



4. The father, mother, grandfather or grandmother of a deceased husband or wife; or,

5. An unmarried sister, or helpless or deformed brother.

Stats. 1851, 296, Sec. 5; 1862, 519, Sec. 3.

**NOTE.**—The class of persons who confer the "nomen" of "head of a family" is by this section enlarged, for obviously apparent reasons.

**SEC. 1254.** The declaration must be signed by the party making it, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded. When such record is made by either husband or wife, or by both, they hold the homestead as joint tenants during their natural lives, and on the death of either, subject to no other liability than such as is created in accordance with this chapter, it descends to, and the title thereof vests absolutely in, the survivor; if there is no survivor, then in his legitimate children; if no legitimate children, then the property is subject to his legal debts, and to administration and succession, as provided in this Code and the CODE OF CIVIL PROCEDURE.

Declaration, how executed and recorded, and the title thereby vested.

Stats. 1860, 311, Secs. 1, 4; 1862, 519, Sec. 2; 1870, 400, Sec. 1; 1865-6, 850, Sec. 1; 1867-8, 172, Sec. 1.

### CHAPTER III.

#### THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.

**SECTION 1260.** Petition to County Judge for homestead, what to contain.

1261. Judge to appoint appraisers, who must make oath.

1262. If property exceeds one thousand dollars in value, what to be done.

1263. Return of appraisers, and Judge to grant certificate.

1264. Title to be recorded, where and how.

**SEC. 1260.** Any person other than a husband or wife, or other "head of a family," desiring to have a homestead set apart and recorded, must present to the County Judge of the county where the premises intended to be claimed as a homestead is situated, a written application setting forth—

Petition to County Judge for homestead, what to contain.





to the applicant a certificate, in writing, setting forth the application, the oaths of the appraisers, the proceedings which took place under it and the return of the appraisers, annexed to the written application, which constitutes the homestead title, and must be delivered, on payment of all costs and expenses, to the applicant.

Stats. 1860, 88, Secs. 6, 7.

Sec. 1264. The homestead title must be recorded in the office of the County Recorder of the county in which the homestead is situated, in a book to be called the "Register of Homesteads of Single Persons;" and, when the homestead is situate in more counties than one, the homestead title must be recorded in the Recorder's office of each of the counties where any part is situated. From the date of the record the homestead title is vested in the applicant during his natural life.

Title to be recorded, where and how.

Stats. 1860, 88, Secs. 8, 9.

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## TITLE VI.

### WILLS.

#### CHAPTER I. EXECUTION AND REVOCATION OF WILLS.

##### II. INTERPRETATION OF WILLS.

##### III. GENERAL PROVISIONS RELATING TO WILLS.

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#### CHAPTER I.

##### EXECUTION AND REVOCATION OF WILLS.

###### Section 1270. Who may make a will.

1271. Monomaniac incompetent.

1272. Will or part thereof procured by fraud.

1273. Separate property of married women.

1274. What may pass by will.

1275. Who may take by will.

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1277. Witness to add residence.

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**SECTION 1281.** Gifts to subscribing witnesses void. Creditors competent witness.

1282. Witness who is a devisee and who would be entitled to share of testator's estate if no will, entitled to share to amount of devise.

1283. Will made out of this State.

1284. Will not duly executed, void.

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1286. Republication by codicil.

1287. Nuncupative will, how to be executed.

1288. Requisites of a valid nuncupative will.

1289. Proof of nuncupative wills.

1290. Probate of nuncupative wills.

1291. Written will, how revoked.

1292. Evidence of revocation.

1293. Revocation by obliteration on face of will.

1294. Revocation of duplicate.

1295. Revocation by subsequent will.

1296. Antecedent not revived by revocation of subsequent will.

1297. Revocation by marriage and birth of issue.

1298. Effect of marriage of a man on his will.

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1300. Contract of sale not a revocation.

1301. Mortgage not a revocation of will.

1302. Conveyance, when not a revocation.

1303. When it is a revocation.

1304. Revocation of codicils.

1305. Afterborn child, unprovided for, to succeed.

1306. Children or issue of children of testator unprovided for by his will.

1307. Share of afterborn child, out of what part of estate to be paid.

1308. Advancement during lifetime of testator.

1309. Death of devisee, being relation of testator, in lifetime of testator, leaving lineal descendants.

1310. Devises of land, how construed.

1311. Will to pass rights acquired after the making thereof.

Who may  
make a will.

**SEC. 1270.** (§ 1.) Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is subject to succession, as provided for in Tit. VII of this Part, as the estate of an intestate, being chargeable in both cases with the payment of all the testator's debts, as provided in the CODE OF CIVIL PROCEDURE.

Stats. 1850, 177, Sec. 1.

Monomaniac  
incompetent

**SEC. 1271.** A person having any insane delusion is incompetent to make a will.

N. Y. C. C., Sec. 543.

**SEC. 1272.** A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

Will or part thereof procured by fraud.

N. Y. C. C., Sec. 544.

**SEC. 1273. (§ 2.)** A married woman may dispose of all her separate estate by will, absolutely, without the consent of her husband, either express or implied, and may alter or revoke the same in like manner as a person under no disability may do; her will must be attested, witnessed and proved in like manner as all other wills.

Separate property of married women.

Stats. 1850, 177, Sec. 2; 1865-6, 317, Sec. 1; Morrison vs. Bowman, 29 Cal., 337.

**SEC. 1274.** Every estate and interest in real or personal property, to which heirs, husband, widow or next of kin might succeed, may be disposed of by will; but community property is subject to Secs. 1396 and 1397.

What may pass by will.

N. Y. C. C., Sec. 545—modified.

**SEC. 1275.** A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized by its charter or by statute so to take.

Who may take by will.

N. Y. C. C., Sec. 546.

**SEC. 1276. (§ 3.)** Every will, other than a nuncupative will, must be in writing, and must be executed and attested as follows:

Written will, how to be executed.

1. It must be subscribed at the end thereof by the testator himself, or by some person in his presence and by his direction.

2. The subscription must be made in the presence of each of the attesting witnesses, or be acknowledged by the testator to each of them, to have been made by him or by his authority.

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request.

N. Y. C. C., Sec. 550; Stats. 1850, 177, Sec. 3.

Witness to  
add resi-  
dence.

SEC. 1277. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

N. Y. C. C., Sec. 552.

Mutual will.

SEC. 1278. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

N. Y. C. C., Sec. 548.

Competency  
of subscrib-  
ing witness.

SEC. 1279. (§ 4.) If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

Stats. 1850, 177, Sec. 4.

Conditional  
will.

SEC. 1280. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

N. Y. C. C., Sec. 549.

Gifts to sub-  
scribing  
witnesses  
void.

Creditors  
competent  
witness.

SEC. 1281. (§ 5.) All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

Stats. 1850, 177, Sec. 5.

Witness who  
is a devisee  
and who  
would be  
entitled to  
share of  
testator's  
estate if no  
will, enti-  
tled to share  
to amount  
of devise.

SEC. 1282. (§ 6.) If a witness, to whom any beneficial devise, legacy or gift is made or given, would have been entitled to any share of the estate of the testator, in case the will is not established, he succeeds to so much of the share as would have been distributed to him, not exceeding the devise or bequest made to him in the will; and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Stats. 1850, 177, Sec. 6.

**SEC. 1283.** (§ 23.) A will of real or personal property, or both, or a revocation thereof, made out of this State by a person not having his domicile in this State, is as valid, when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this State, and according to the provisions of this chapter.

Will made  
out of this  
State.

N. Y. C. C., Sec. 554; Stats. 1850, 179, Sec. 23.

**SEC. 1284.** No will or revocation is valid unless executed either according to the provisions of this chapter, or according to the law of the place in which it was made, or in which the testator was at the time domiciled.

Will not  
duly execu-  
ted, void.

N. Y. C. C., Sec. 555.

**SEC. 1285.** Whenever a will, or a revocation thereof, is duly executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding that the testator subsequently changed his domicile to a place by the law of which such will would be void.

Subsequent  
change of  
domicile.

N. Y. C. C., Sec. 556; Norris vs. Harris, 15 Cal., 226.

**NOTE.**—The three preceding sections change the rule of our statutes requiring all wills to be executed according to our laws, and admitted to probate as our laws require. These sections seem to be more liberal and just, and are therefore adopted. Sec. 1324 of the Code of Civil Procedure must be construed to conform to these sections.

**SEC. 1286.** The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

Republica-  
tion by cod-  
icil.

N. Y. C. C., Sec. 553; Payne vs. Payne, 18 Cal., 291.

**SEC. 1287.** A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

Nuncupative  
will, how to  
be executed.

N. Y. C. C., Sec. 551.

**SEC. 1288.** (§ 7.) To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

Requisites  
of a valid  
nuncupative  
will.

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.

3. The decedent must, at the time, have been in his last illness, or in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death.

4. Except in the cases mentioned in Subd. 3 of this section, it must be made at the dwelling house of the testator, or where he was residing for the space of ten days or more, unless taken sick from home and death ensues before his return.

Stats. 1850, 177, Sec. 7; N. Y. C. C., Sec. 547.

Proof of  
nuncupative  
wills.

SEC. 1289. (§ 8.) No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

Stats. 1850, 178, Sec. 8.

Probate of  
nuncupative  
wills.

SEC. 1290. (§ 9.) No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other person interested, to contest the probate of such will, if they think proper.

Stats. 1850, 178, Sec. 9.

Written will,  
how revoked

SEC. 1291. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than—

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

N. Y. C. C., Sec. 561.

**SEC. 1292.** (§ 10.) When a will is cancelled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

Evidence of revocation.

N. Y. C. C., Sec. 562; Stats. 1850, 178, Sec. 10.

**SEC. 1293.** A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition, the testator attempts to revoke a provision of the will, by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.

Revocation by obliteration on face of will.

N. Y. C. C., Sec. 563.

**SEC. 1294.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

Revocation of duplicate.

N. Y. C. C., Sec. 564.

**SEC. 1295.** A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

Revocation by subsequent will.

N. Y. C. C., Sec. 565.

**SEC. 1296.** (§ 11.) If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation or revocation, the first will is duly republished.

Antecedent not revived by revocation of subsequent will.

Stats. 1850, 178, Sec. 11.

**SEC. 1297.** If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such

Revocation by marriage and birth of issue.

issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

N. Y. C. C., Sec. 567.

Effect of marriage of a man on his will.

SEC. 1298. (§ 12.) If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

Stats. 1850, 178, Sec. 12.

Effect of a marriage of a woman on her will.

SEC. 1299. (§ 13.) A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

Stats. 1850, 178, Sec. 13.

Contract of sale not a revocation.

SEC. 1300. (§ 14.) An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

N. Y. C. C., Sec. 569; Stats. 1850, 178, Sec. 14.

Mortgage not a revocation of will.

SEC. 1801. (§ 15.) A charge or encumbrance upon any estate, for the purpose of securing the payment of money, or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance.

Stats. 1850, 178, Sec. 15.

Conveyance, when not a revocation.

SEC. 1302. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

N. Y. C. C., Sec. 571.



**SEC. 1303.** If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

When it is a  
revocation.

N. Y. C. C., Sec. 572.

**SEC. 1304.** The revocation of a will revokes all its codicils.

Revocation  
of codicils.

N. Y. C. C., Sec. 573.

**SEC. 1305.** (§ 16.) Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

Afterborn  
child, un-  
provided for,  
to succeed.

N. Y. C. C., Sec. 574; Stats. 1850, 178, Sec. 16.

**SEC. 1306.** (§ 17.) When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.

Children or  
issue of chil-  
dren of tes-  
tator unpro-  
vided for by  
his will.

Stats. 1850, 178, Sec. 17.

**SEC. 1307.** (§ 18.) When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be

Share of  
afterborn  
child, out of  
what part  
of estate to  
be paid.

exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Stats. 1850, 178, Sec. 18.

Advance-  
ment during  
lifetime of  
testator.

SEC. 1308. (§ 19.) If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

Stats. 1850, 179, Sec. 19.

Death of  
devisee, be-  
ing relation  
of testator,  
in lifetime  
of testator,  
leaving lin-  
eal descend-  
ants.

SEC. 1309. (§ 20.) When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving a successor, such successor takes the estate so given by the will, in the same manner as the devisee would have done had he survived the testator.

Stats. 1850, 179, Sec. 20.

Devises of  
land, how  
construed.

SEC. 1310. (§ 21.) Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Stats. 1850, 179, Sec. 21.

Will to pass  
rights ac-  
quired after  
the making  
thereof.

SEC. 1311. (§ 22.) Any estate, right or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, if it manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all such real estate which such testator was entitled to devise at the time of his decease.

Stats. 1850, 179, Sec. 22; 1865-6, 381, Sec. 1.

NOTE.—The preceding chapter is taken from our own statutes on wills—the old section being given thus (1), in parenthesis—and from the New York Civil Code, to which reference is frequently made, as will be observed.

## CHAPTER II.

## INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

**SECTION 1317.** Testator's intention to be carried out.

1318. Intention to be ascertained from the will.

1319. Rules of interpretation.

1320. Several instruments are to be taken together.

1321. Harmonizing various parts.

1322. In what case devise not affected.

1323. When ambiguous or doubtful.

1324. Words taken in ordinary sense.

1325. Words to receive an operative construction.

1326. Intestacy to be avoided.

1327. Effect of technical words.

1328. Technical words not necessary.

1329. Certain words not necessary to pass a fee.

1330. Power to devise, how executed by terms of will.

1331. Devise or bequest of all real or all personal property, or both.

1332. Residuary clause.

1333. Same.

1334. "Heirs," "relatives," "issue," "descendants," etc.

1335. Words of donation and of limitation.

1336. To what time words refer.

1337. Devise or bequest to a class.

1338. When conversion takes effect.

1339. When child born after testator's death takes under will.

1340. Mistakes and omissions.

1341. When devises and bequests vest.

1342. When cannot be divested.

1343. Death of devisee or legatee.

1344. Interests in remainder are not affected.

1345. Conditional devises and bequests.

1346. Condition precedent, what.

1347. Effect of condition precedent.

1348. Conditions precedent, when deemed performed.

1349. Conditions subsequent, what.

1350. Devisees, etc., take as tenants in common.

1351. Advancements, when adoptions.

**SEC. 1317.** A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Testator's  
intention to  
be carried  
out

*Kidwell vs. Brummagim, 32 Cal., 436.*

**SEC. 1318.** In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from

Intention to  
be ascertain-  
ed from the  
will.

the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

Rules of interpretation.

SEC. 1319. In interpreting a will, subject to the law of this State, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

Several instruments are to be taken together.

SEC. 1320. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

Harmonizing various parts.

SEC. 1321. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

In what case devise not affected.

SEC. 1322. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

When ambiguous or doubtful.

SEC. 1323. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

Words taken in ordinary sense.

SEC. 1324. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Words to receive an operative construction.

SEC. 1325. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

Intestacy to be avoided.

SEC. 1326. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Effect of technical words.

SEC. 1327. Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

**SEC. 1328.** Technical words are not necessary to give effect to any species of disposition by a will. Technical words not necessary.

**SEC. 1329.** The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited. Certain words not necessary to pass a fee.

**SEC. 1330.** Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator. Power to devise, how executed by terms of will.

**SEC. 1331.** A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death. Devise or bequest of all real or all personal property, or both.

**SEC. 1332.** A devise of the residue of the testator's estate, property, or real property, passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will. Residuary clause.

**SEC. 1333.** A bequest of the residue of the testator's estate, property, or personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will. Same

**SEC. 1334.** A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives" or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin" of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the Title on *Succession*, in this Code. "Heirs," "relatives," "issues," "descendants," etc.

Norris vs. Hensley, 27 Cal., 39.

**SEC. 1335.** The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, Words of donation and of limitation

and not as a qualification of an estate given to the ancestor of such person.

To what time words refer.

SEC. 1336. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Devise or bequest to a class.

SEC. 1337. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

When conversion takes effect.

SEC. 1338. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

When child born after testator's death takes under will.

SEC. 1339. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Mistakes and omissions.

SEC. 1340. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received.

When devisees and bequests vest.

SEC. 1341. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

When cannot be divested.

SEC. 1342. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Death of devisee or legatee.

SEC. 1343. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place.

**SEC. 1341.** The death of a devisee or legatee of a limited interest, before the testator's death, does not defeat the interests of persons in remainder, who survive the testator.

Interests in remainder are not affected.

**SEC. 1345.** A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Conditional devises and bequests.

**SEC. 1346.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

Condition precedent, what.

**SEC. 1347.** Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled; except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

Effect of condition precedent.

**SEC. 1348.** A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.

Conditions precedent, when deemed performed.

**SEC. 1349.** A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

Conditions subsequent, what.

**SEC. 1350.** A devise or legacy given to more than one person vests in them as owners in common.

Devisees, etc., take as tenants in common.

**SEC. 1351.** Advancements or gifts are not to be taken as adempptions of general legacies, unless such intention is expressed by the testator in writing.

Advancements, when adempptions.

**NOTE.**—The preceding chapter is, in a modified form, taken from the New York Civil Code, from Secs. 579 to 613, inclusive. We have had no general rules of construction adopted by our Legislature, and after the preparation of the first chapter of this Title it was thought best to adopt also these rules of construction. The usual course of noting each section from which they are taken, for economy in printing, is departed from in this chapter.





4. A residuary legacy embraces only that which remains Residuary.  
after all the bequests of the will are discharged.

5. All other legacies are general legacies. General.

**SEC. 1358.** When a person dies intestate, his prop- Order of sale  
in case of an  
intestate.  
erty, except such as is otherwise disposed of under this  
Code, and under Chap. V, Tit. XI, of the CODE OF CIVIL  
PROCEDURE, and exempt from execution therein, is to be  
resorted to, in the following order, in payment of debts:

1. Personal property.
2. Real property, other than estates of freehold.
3. Estates of freehold.

**SEC. 1359.** The property of a testator, with the excep- Order of sale  
in case of a  
testator.  
tion specified in the last section, is to be resorted to, in  
the following order, for the payment of debts and legacies:

1. Personal property, excepting such as is expressly  
exempted in the will.

2. Real property expressly devised to pay debts or  
legacies, where the personal property is exempted in the  
will, or where the personal property which is not ex-  
empted is insufficient.

3. Real property which is not effectually devised.

4. Property, real or personal, charged with debts or  
legacies; but though real property is charged with the  
payment of legacies, the personal property is not to be  
exonerated.

5. The following property, ratably: real property,  
devised without being charged with debts or legacies,  
and specific and demonstrative legacies.

6. Personal property expressly exempted in the will.

Cal. C. C. P., Tit. XI, Chap. VII.

**SEC. 1360.** In the application of the personal property Legacies,  
how charged  
with debts.  
of a decedent to the payment of debts, legacies must be  
charged in the following order, unless a different inten-  
tion is expressed in the will:

1. Residuary legacies.
2. General legacies.
3. Legacies given for a valuable consideration, or for  
the relinquishment of some right or interest.
4. Specific and demonstrative legacies.

## **CIVIL CODE**

**Sec. 1361.** Legacies to husband and wife, or to any class, are chargeable only as to the residue of the estate, and not related to the testator.

**Sec. 1362.** Abatement takes place in any class only as to the residue of the estate, between legacies of that class, unless a different intention is expressed in the will.

**Sec. 1363.** In a specific devise or legacy, the title passes by the will; but in case of legacies, possession can only be obtained from the personal representative; and he may be authorized by the Judge of the Probate Court to sell the property devised and bequeathed, in the cases herein provided.

**Sec. 1364.** The rights of a purchaser or encumbrance of real property, in good faith, and for value, derive from any person claiming the same by succession, are not impaired by any devise made by the decedent from whose succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the Clerk of the Probate Court having jurisdiction thereof, or unless written notice of such devise is filed with the Clerk of the county where the real property is situated, within four years after the devisor's death.

**N. Y. C. C., Sec. 621.**

**Sec. 1365.** Where specific legacies are for life only the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

**N. Y. C. C., Sec. 622.**

**Sec. 1366.** In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

**N. Y. C. C., Sec. 623.**

**Sec. 1367.** A legacy, or a gift in contemplation, fear or peril of death, may be satisfied.

SEC. 1368. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

Legacies.  
when due.

SEC. 1369. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

Interest.

SEC. 1370. The four preceding sections are in all cases to be controlled by a testator's express intention.

Construction  
of these  
rules.

SEC. 1371. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

Executor  
according to  
the tenor.

SEC. 1372. An authority to an executor to appoint an executor is void.

Power to  
appoint is  
invalid.

SEC. 1373. No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

Executor not  
to act till  
qualified.

SEC. 1374. The provisions of this Title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.

Provisions  
as to revoca-  
tions.

SEC. 1375. The provisions of this Title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

Execution  
and con-  
struction of  
prior wills  
not affected.

SEC. 1376. The term "will," as used in this Code, includes all codicils as well as wills.

"Wills" in-  
clude cod-  
icils.

Stats. 1850, 177, Sec. 24.

SEC. 1377. Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this State, by the law of this State; when relating to personal property, by the law of the testator's domicile.

The law of  
what place  
applies.

Liability of  
beneficiaries  
for testator's  
obligations.

SEC. 1378. Those to whom  
are liable for the obligations of  
and to the extent prescribed by  
ORDURE.

NOTE.—The three chapters  
embraces all the laws  
not contained in Tit. 1  
as also many of the provisions of the  
York on the corresponding  
636, inclusive. This section  
heretofore by our laws,  
when the provisions are  
viously well digested as  
may demonstrate the  
those given are supposed  
contingency.

## TITLE

### SUCCESSI

SECTION 1384. Succession defined.

1385. Who first succeeds to property  
for what purpose.

1386. Succession to and distribution of

1387. Illegitimate children to inheritance

1388. The mother is successor

1389. Degrees of kindred, how

1390. Advancements constitute

1391. Advancements, when too

1392. What are advancements.

1393. Value of advancements,

1394. When heir advanced to d

1395. Inheritance of husband and

1396. Distribution of the common  
wife.

1397. Distribution of common

1398. Inheritance by representation

1399. Aliens may inherit, when

1400. Succession not claimed,  
sold, and proceeds de

1401. When the property and e

1402. Property encumbered subje

1403. Successor liable for deced

Succession  
defined.

SEC. 1384. Succession is the  
take the property of one who d  
by will.

adopting the term "Succession," and dis-  
 more familiar expression, "Descents and distri-  
 so long, an *apology*, if no *paramount reason*  
 from us. We have not, for the mere love of  
 anything; for it is better to adhere to every-  
 and found *well enough*, unless a substantial  
 for the change. It is not a matter of surprise  
 . In the preparation of all our laws, a simili-  
 between ours and those of our mother country;  
 .ments and system of laws, if not entirely, are  
 ant. Then as we progress in the perfection of  
 m, it is expected that we shall become more  
*et generis*." The following reasons for the  
 .ven by the New York Code Commissioners,  
 and sufficient:

'descent,' hitherto chiefly used in this State  
 devolution of an inheritance, was derived from  
 inciple of the English law, that an inheritance  
 ascend or pass from son to father, but must de-  
 to descendants. But as the American law  
 ty to pass in both ways, there arises an incon-  
 inuing this use of the term; an incongruity  
 practical embarrassment, since the word 'de-  
 ist still be confined to its strict meaning, and  
 ice all those who may take by our statute of  
 alled, and the word 'descend' must often be  
 me view and in contradistinction to the devo-  
 erty in the ascending line. The term 'succi-  
 more appropriate phrase of the civil law, and  
 in common use among us, the Commissioners  
 to denote the transmission of the property of  
 'operation of law.'

perty, both real and personal, of  
 out disposing of it by will, passes,  
 the personal representative who  
 recutor, administrator, or adminis-  
 inered, as the Trustee of such de-

Who first  
 succeeds to  
 possession of  
 estates not  
 devised, and  
 for what  
 purpose.

ision for the surviving husband, or  
 directed by Tit. XI, Part III, of  
 OCEDURE.

perty to the payment of the debts  
 ling to the Title on *Wills* and the  
 OF CIVIL PROCEDURE; and,  
 remaining property among those  
 he property of the decedent, accord-  
 of this Title.

), Secs. 638-9, modified.

ny person having title to any estate  
 by marriage contract dies without  
 by will, it is succeeded to, and must

Succession  
 to and dis-  
 tribution  
 property.

Succes-  
to and dis-  
tribution of  
property.

be distributed, subject to the following manner:

1. If the decedent leave and only one child, or the equal shares to the surviving issue of such child. If living husband or wife, or one child living, and the deceased children, one-third wife, and the remainder is and to the lawful issue of any deceased child, by right of representation. If there be no child of the decedent living at his death, the remainder shall go to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation.

2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leaves a mother also, she takes an equal share with the brothers and sisters. If decedent leaves no issue, or husband, or wife, the estate must go to his father.

3. If there be no issue, husband, wife or father, then in equal shares to the brothers and sisters of the decedent and to the children of any deceased brother or sister, by right of representation; if a mother survives, she takes an equal share with the brothers and sisters.

4. If the decedent leaves no issue, husband, wife or father, and no brother or sister is living at the time of his death, the estate goes to his mother, to the exclusion of the issue, if any, of decedent's brothers or sisters.

5. If the decedent leaves a surviving husband or wife, and no issue, and no father, mother, brother or sister, the whole estate goes to the surviving husband or wife.

6. If the decedent leaves no issue, husband or wife, and no father, mother, brother or sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those

who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote; however—

7. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

8. If, at the death of such child, who dies under age, not having been married, and all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent, descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

9. If the decedent leaves no husband, wife or kindred, the estate escheats to the State for the support of common schools.

Stats. 1850, 219, Sec. 1 ; 1862, 569, Sec. 1.

Sec. 1387. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father

Illegitimate children to inherit in certain events.

and mother, respectively, the children in like manner. The issue of all marriages, after divorce, are legitimate.

Stats. 1850, 219, §

The mother is successor to illegitimate child.

Sec. 1388. If an illegitimate issue, his estate devolves in case of her decease, to her heirs.

Stats. 1850, 220, §

Degree of kindred, how computed.

Sec. 1389. The degrees of kindred according to the rules of the civil law, half blood inherit equally with whole blood in the same degree, unless intestate by descent, devise or bequest of ancestors, in which case whole blood of such ancestors must inherit.

Stats. 1850, 221, §

Advancements constitute part of distributive share.

Sec. 1390. Any estate, real or personal, decedent in his lifetime, as a parent or other lineal descendant, is to be deducted from the purposes of distribution thereof among his issue, and other lineal descendant, in proportion to the estate of the decedent.

Stats. 1850, 221, §

Advancements, when too much, or not enough.

Sec. 1391. If the amount of an advancement exceeds the share of the heir, the heir is to be excluded from any further distribution of the estate, but is to be refunded any part of such advancement so received is less than his share, or more as will give him his full share of the estate of the decedent.

Stats. 1850, 221, §

What are advancements.

Sec. 1392. All gifts and advancements, if expressed in the gift, or charged in writing by the donor, or acknowledged in writing by the donee, are advancements.

Stats. 1850, 221, §



value of the estate so advanced is  
veyance, or in the charge thereof  
, or in the acknowledgment of the  
must be held as of that value, in the  
ion of the estate; otherwise, it must  
g to its value when given, as nearly  
certained.

Value of ad-  
vancements,  
how deter-  
mined.

10, 221, Sec. 8.

child or other lineal descendant,  
it, dies before the decedent, leaving  
it must be taken into consideration  
distribution of the estate, and the  
be allowed accordingly, by the rep-  
eirs receiving the advancement, in  
he advancement had been made

When heir  
advanced to  
dies before  
decedent.

10, 221, Sec. 9.

visions of the preceding sections of  
inheritance of the husband and  
apply only to the separate property

Inheritance  
of husband  
and wife  
from each  
other.

10, 221, Sec. 10.

he death of the wife, the entire  
thout administration, belongs to the  
he shall not have abandoned and  
part from her; but if the husband  
d his wife, and lived separate and  
alf of the common property, subject  
he debts chargeable to the estate  
the husband and wife, is at her tes-  
t, and in the absence of such dispo-  
cendants or heirs at law, exclusive

Distribution  
of the com-  
mon proper-  
ty in case of  
death of the  
wife.

63-4, 243, Sec. 1.

the death of the husband, one-half  
rty goes to the surviving wife, and  
ect to the testamentary disposition  
in the absence of such disposition,  
ts, equally, if such descendants are  
kindred to the decedent; otherwise,

Distribution  
of common  
property on  
death of the  
husband.

according to the right of re-  
absence of both such dispositio  
is subject to distribution in t  
separate property of the husbar  
lution of the community by the  
entire common property is equ  
the family allowance, and the  
administration.

Stats. 1863-4, 363, Sec

NOTE.—Before preparing the bill for the Legislature, Sect.  
178 and 1274 must be thoroughly examined and made to  
harmonize, if they are found inconsistent.

Inheritance  
by repre-  
sentation.

Sec. 1398. Inheritance or succession "by right of rep-  
resentation" takes place when the descendants of any  
deceased heir take the same share or right in the estate  
of another person that their parents would have taken if  
living. Posthumous children are considered as living at  
the death of their parents.

Stats. 1850, 221, Sec. 11.

Aliens may  
inherit,  
when and  
how.

Sec. 1399. Resident aliens may take in all cases by  
succession as citizens; and no person capable of succeed-  
ing under the provisions of this Title, is precluded from  
such succession by reason of the alienage of any relative;  
but no non-resident foreigner can take by succession  
unless he appears and claims such succession within five  
years after the death of the decedent to whom he claims  
succession.

Const., Art. I, Sec. 17; 1856, 137, Sec. 1; *State vs. Ba-  
gers*, 13 Cal., 159; N. Y. C. C., Sec. 660.

Succession  
not claimed,  
Attorney-  
General to  
cause to be  
sold, and  
proceeds de-  
posited.

Sec. 1400. When succession is not claimed as provided  
in the preceding section, the District Court, on informa-  
tion, must direct the Attorney-General to reduce the  
property to his or the possession of the State, or to cause  
the same to be sold, and the same or the proceeds thereof  
to be deposited in the State treasury for the benefit of  
such non-resident foreigner, or his legal representative,  
to be paid to him whenever, within five years after such  
deposit, proof to the satisfaction of the State Controller  
and Treasurer is produced that he is entitled to succeed  
thereto.

Stats. 1856, 137, Sec. 1.

**SEC. 1401.** When so claimed, the evidence and the joint order of the Controller and Treasurer must be filed by the Treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the State, and is placed by the State Treasurer to the credit of the School Fund.

When the property and estate escheat to the State.

Stats. 1856, 137, Sec. 1.

**SEC. 1402.** Real property passing to the State under the last section, whether held by the State or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of Tit. VIII, Part III, of the CODE OF CIVIL PROCEDURE.

Property escheated subject to charges as other property.

Stats. 1870, 72, Sec. 1; 1862, 103, Sec. 2 *et seq.*; 1855, 222, Sec. 1 *et seq.*; N. Y. C. C., Sec. 668.

**SEC. 1403.** Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the CODE OF CIVIL PROCEDURE.

Successor liable for decedent's obligations.

N. Y. C. C., Sec. 669.

## TITLE VIII.

### MINES.

**SECTION 1409.** Injuring crops or buildings.

1410. Miners to give bonds.

1411. Construction of word "improvements."

1412. After crops are harvested, miners may work.

**NOTE.**—The statute (1855, 145) is such a hybrid specialty, and has been so much adjudicated upon, that no attempt is made to alter its phraseology. A chapter is needed, codifying the decisions of the Supreme Court into a few comprehensible sections, which should be made to harmonize with each other, and also with the fundamental rights which every citizen has in property when once acquired, whether in buildings, trees or crops. The penal section (Sec. 3) of the Act is, or ought to be, in the Penal Code.

**SEC. 1409.** No person shall, for mining purposes, destroy or injure any growing crops of grain or garden

Injuring crops or buildings.

(  
vegetables growing up  
nor undermine or injur  
or fruit trees, standing  
perty of another, exoc

to  
the

Sec. 1410. Whenever  
shall desire to occupy  
State, then occupied  
garden vegetables, fru  
improvements, proper  
first give bond to the  
ing, fruit trees or othe  
a Justice of the Peace  
sufficient sureties, in a  
ested citizens, househ  
selected by the obligor  
Justice of the Peace  
the obligor, shall pay t  
which said obligee may, ~~in consequence of~~  
struction by the obligor, or those in his employ, of the  
growing crops, fruit trees, improvements or buildings of  
the obligee.

tion

re-

Sec. 1411. The word "improvements," in this Title,  
shall be construed to mean any superstructure on said  
farm, ranch or garden, and nothing more.

pe  
ent-  
re  
k.

Sec. 1412. Nothing in this Title shall prevent mine  
from working any mineral lands in the State, after th  
growing crops on the same are harvested.

## **DIVISION THIRD.**

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**PART I. OBLIGATIONS IN GENERAL.**

**II. CONTRACTS.**

**III. OBLIGATIONS IMPOSED BY LAW.**

**IV. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.**



# PART I.

## OBLIGATIONS IN GENERAL.

### DEFINITION OF OBLIGATIONS.

### INTERPRETATION OF OBLIGATIONS

### TRANSFER OF OBLIGATIONS.

### EXTINCTION OF OBLIGATIONS.

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## TITLE I.

### DEFINITION OF OBLIGATIONS.

Q. What.

A. Is.

Obligation is a legal duty, by which a person is bound to do or not to do a certain thing.

Obligation,  
what.

C. C., Sec. 670.

Sec. 1419. An obligation arises either from—

How created

1. The contract of the parties; or,
2. The operation of law.

N. Y. C. C., Sec. 671.

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## TITLE II.

### INTERPRETATION OF OBLIGATIONS.

#### CHAPTER I. GENERAL RULES OF INTERPRETATION.

#### II. JOINT OR SEVERAL OBLIGATIONS.

#### III. CONDITIONAL OBLIGATIONS.

#### IV. ALTERNATIVE OBLIGATIONS.

## CHAPTER I.

## GENERAL RULES OF INTERPRETATION.

## SECTION 1423. General rules.

General  
rules.

SEC. 1423. The rules which govern the interpretation of contracts are prescribed by Part II of this Division. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted.

Obligations may be divided into three classes, arising respectively out of contract, common law or statute. Those which are imposed by the common law explain themselves, their interpretation being a part of their essential nature. Contracts are interpreted by rules which differ materially from the rules governing the interpretation of statutes, and the two sets of rules, therefore, cannot well be united in one chapter.

N. Y. C. C., Sec. 672.

## CHAPTER II.

## JOINT OR SEVERAL OBLIGATIONS.

## SECTION 1427. Obligations, joint or several, etc.

## 1428. When joint.

## 1429. Contribution between joint parties.

Obligations,  
joint or sev-  
eral, etc.

SEC. 1427. An obligation imposed upon several persons, or a right created in favor of several persons, may be—

1. Joint.
2. Several ; or,
3. Joint and several.

N. Y. C. C., Sec. 673.

When joint.

SEC. 1428. An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the Title on the *Interpretation of Contracts*. This presumption, in the case of a right, can be overcome only by express words to the contrary.

N. Y. C. C., Sec. 674.

Contribution  
between  
joint parties.

SEC. 1429. A party to a joint or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.



The three following sections should be inserted in the Code of Civil Procedure :

" SEC. —. A joint obligation cannot be enforced at any time against any of the parties jointly liable, unless it is at the same time, and by the same proceeding, enforced against all.

" SEC. —. A joint and several obligation cannot be enforced by one proceeding against more than one of the promisers, unless it is by the same proceeding enforced against all. But it may be enforced against each of them successively, until satisfied by one of them.

" SEC. —. A joint and several right can be enforced only once, and either by one party only, or by all."

N. Y. C. C., Sec. 675.

### CHAPTER III.

#### CONDITIONAL OBLIGATIONS.

SECTION 1434. Obligation, when conditional.

1435. Conditions, kinds of.

1436. Conditions precedent.

1437. Conditions concurrent.

1438. Condition subsequent.

1439. Performance, etc., of conditions, when essential.

1440. When performance, etc., excused.

1441. Impossible or unlawful conditions void.

1442. Conditions involving forfeiture, how construed.

SEC. 1434. An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

Obligation,  
when con-  
ditional.

N. Y. C. C., Sec. 676.

SEC. 1435. Conditions may be precedent, concurrent or subsequent.

Conditions,  
kinds of.

N. Y. C. C., Sec. 677.

SEC. 1436. A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

Conditions  
precedent.

N. Y. C. C., Sec. 678.

SEC. 1437. Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.

Conditions  
concurrent.

N. Y. C. C., Sec. 679.

SEC. 1438. A condition subsequent is one referring to a future event, upon the happening of which the obliga-

Condition  
subsequent.

tion becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

N. Y. C. C., Sec. 680.

Perform-  
ance, etc.,  
of condi-  
tions, when  
essential.

SEC. 1439. Before any party to an obligation can require another party to perform any act under it, he must fulfil all conditions precedent thereto imposed upon himself; and must be able, and offer, to fulfil all conditions concurrent, so imposed upon him, on the like fulfilment by the other party, except as provided by the next section.

N. Y. C. C., Sec. 681.

When per-  
formance,  
etc., excused.

SEC. 1440. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.

N. Y. C. C., Sec. 682.

Impossible  
or unlawful  
conditions  
void.

SEC. 1441. A condition in a contract, the fulfilment of which is impossible or unlawful, within the meaning of the article on the *Object of Contracts*, or which is repugnant to the nature of the interest created by the contract, is void.

N. Y. C. C., Sec. 683.

Conditions  
involving  
forfeiture,  
how con-  
strued.

SEC. 1442. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

N. Y. C. C., Sec. 684.

## CHAPTER IV.

### ALTERNATIVE OBLIGATIONS.

SECTION 1448. Who has the right of selection.

1449. Right of selection, how lost.

1450. Alternatives indivisible.

1451. Nullity of one or more of alternative obligations.

Who has the  
right of  
selection.

SEC. 1448. If an obligation requires the performance of one of two acts, in the alternative, the party required

to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

N. Y. C. C., Sec. 685.

SEC. 1449. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

Right of  
selection,  
how lost.

N. Y. C. C., Sec. 686.

SEC. 1450. The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.

Alternatives  
indivisible.

N. Y. C. C., Sec. 687.

SEC. 1451. If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful, or impossible of performance, the obligation is to be interpreted as though the other stood alone.

Nullity of  
one or more  
of alterna-  
tive obliga-  
tions.

N. Y. C. C., Sec. 688.

## TITLE III.

### TRANSFER OF OBLIGATIONS.

SECTION 1457. Burden of obligation, not transferable.

1458. Rights arising out of obligation, transferable.

1459. Non-negotiable instruments may be transferred.

1460. Covenants running with land, what.

1461. What covenants run with land.

1462. Same.

1463. Same.

1464. What covenants run with land when assigns are named.

1465. Who are bound by covenants.

1466. Who are not.

1467. Apportionment of covenants.

SEC. 1457. The burden of an obligation may be transferred, with the consent of the party entitled to its benefit, but not otherwise, except as provided by Sec. 1466.

Burden of  
obligation,  
not trans-  
ferable.

This is as true of covenants running with the land as of any other obligations. The original covenantor remains

liable to the covenantee, notwithstanding that the land passes into other hands (*House vs. Burr*, 24 Barb., 525; *Damb vs. Hoffman*, 3 K. D. Smith, 361; *Port vs. Jackson*, 17 Johns., 239, 479; *Jackson vs. Brownson*, 7 id., 227). So, where one has agreed to perform a service, he cannot compel the other party to accept the service from a third person and to release him therefrom (*Robson vs. Drummond*, 2 B. & Ad., 303). It is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party thereto from his obligations, without the consent of the creditor.

N. Y. C. C., Sec. 689.

Rights arising out of obligation, transferable.

SEC. 1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.

N. Y. C. C., Sec. 690.

Non-negotiable instruments may be transferred.

SEC. 1459. A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee; subject to all equities and defences existing in favor of the maker at the time of the indorsement.

[New section.]

NOTE.—This section supersedes the Act relative to bonds, due bills and other instruments in writing, passed April 20, 1850 (Stats. 1850, 332). The general provisions of this Code as to "Fraud," "Tender," "Diligence," "Failure of Consideration," etc., cover all the substantial requisites of this Act.

Covenants running with land, what.

SEC. 1460. Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

N. Y. C. C., Sec. 691.

What covenants run with land.

SEC. 1461. The only covenants which run with the land are those specified in this Title, and those which are incidental thereto.

N. Y. C. C., Sec. 692.

Same.

SEC. 1462. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.

N. Y. C. C., Sec. 693.

**SEC. 1463.** The last section includes covenants "of same. warranty," "for quiet enjoyment," or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee.

N. Y. C. C., Sec. 694.

**NOTE.**—The first three covenants mentioned in this section ought to follow the fate of the covenant of seisin, which was originally held to "run with the land," but now held to be a personal covenant. The two last covenants and those described in the next section are properly the only real covenants made for the direct benefit of the property.

Code Covenants are classed as personal covenants by Sec. 1116 of this Code. See, also, note to Sec. 1112 of this Code.

**SEC. 1464.** A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

What covenants run with land when assigns are named.

N. Y. C. C., Sec. 695.

**SEC. 1465.** A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property.

Who are bound by covenants.

N. Y. C. C., Sec. 696.

**SEC. 1466.** No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.

Who are not.

N. Y. C. C., Sec. 697.

**SEC. 1467.** Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.

Apportionment of covenants.

N. Y. C. C., Sec. 698.

## TITLE IV.

## EXTINCTION OF OBLIGATIONS.

## CHAPTER I. PERFORMANCE.

## II. OFFER OF PERFORMANCE.

## III. PREVENTION OF PERFORMANCE OR OFFER.

## IV. ACCORD AND SATISFACTION.

## V. NOVATION.

## VI. RELEASE.

## CHAPTER I.

## PERFORMANCE.

## SECTION 1473. Obligation extinguished by performance.

1474. Performance by one of several joint debtors.

1475. Performance to one of joint creditors.

1476. Effect of directions by creditors.

1477. Partial performance.

1478. Payment, what.

1479. Application of general performance.

Obligation  
extinguished  
by perform-  
ance.

SEC. 1473. Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it.

N. Y. C. C., Sec. 699.

Performance  
by one of  
several joint  
debtors.

SEC. 1474. Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all.

N. Y. C. C., Sec. 700.

Performance  
to one of  
joint cred-  
itors.

SEC. 1475. An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the Title on *Deposit*.

N. Y. C. C., Sec. 701.

Effect of  
directions by  
creditors.

SEC. 1476. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though

the creditor does not receive the benefit of such performance.

N. Y. C. C., Sec. 702.

SEC. 1477. A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it, without injuring his own property, his retention thereof is not presumed to be voluntary.

Partial performance.

N. Y. C. C., Sec. 703.

SEC. 1478. Performance of an obligation for the delivery of money only, is called payment.

Payment, what.

N. Y. C. C., Sec. 704.

SEC. 1479. Where a debtor, under several obligations to another, does an act, by way of performance, which is equally applicable to two or more of such obligations, such performance is applied as follows :

Application of general performance

1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, is manifested to the creditor, it is so applied.

2. If no such application is then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of the debtor.

3. If neither party makes such application within the time prescribed herein, the performance is applied to the extinction of obligations in the following order; and, if there is more than one obligation of a particular class, to the extinction of all in that class, ratably :

(1.) Of an obligation due at the time of performance;

- (2.) Of an obligation not voidable at the option of the debtor ;
- (3.) Of an obligation secured by a lien or collateral undertaking ;
- (4.) Of interest ;
- (5.) Of the obligation earliest in date of maturity ;
- (6.) Of the obligation which it is most for the interest of the debtor to extinguish.

N. Y. C. C., Sec. 705.

## CHAPTER II.

### OFFER OF PERFORMANCE.

**SECTION 1485.** Obligation extinguished by offer of performance.

- 1486. Offer of partial performance.
- 1487. By whom to be made.
- 1488. To whom to be made.
- 1489. Where offer may be made.
- 1490. When offer must be made.
- 1491. Same.
- 1492. Compensation after delay in performance.
- 1493. Offer to be made in good faith.
- 1494. Conditional offer.
- 1495. Ability and willingness essential.
- 1496. Production of thing to be delivered, not necessary.
- 1497. Thing offered, to be kept separate.
- 1498. Performance of condition precedent.
- 1499. Written receipts.
- 1500. Extinction of pecuniary obligation.
- 1501. Objections to mode of offer.
- 1502. Title to thing offered.
- 1503. Custody of thing offered.
- 1504. Effect of offer on accessories of obligation.
- 1505. Creditor's retention of thing which he refuses to accept.

Obligation  
extinguished  
by offer of  
performance

**Sec. 1485.** An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

This is the present law with respect to all obligations other than for the payment of money (*Des Arts vs. Loggett*, 16 N. Y., 582 ; *Billings vs. Vanderbeck*, 23 Barb., 546 ; *Slingerland vs. Morse*, 8 Johns., 474). It is not now the law as to pecuniary obligations, the debtor having no power to rid himself of the debt without the consent of the creditor (see *Dixon vs. Clark*, 5 C. B., 365, 377 ; *Waistell vs. Atkinson*, 3 Bing., 290 ; *Kortwright vs. Cady*, 23 Barb., 490 ; 21 N. Y., 343).

N. Y. C. C., Sec. 706.



**SEC. 1486.** An offer of partial performance is of no effect. Offer of partial performance.  
 N. Y. C. C., Sec. 707.

**SEC. 1487.** An offer of performance must be made by the debtor, or by some person on his behalf and with his assent. By whom to be made.  
 N. Y. C. C., Sec. 708.

**SEC. 1488.** An offer of performance must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and if not, then to a Notary Public. To whom to be made.  
 N. Y. C. C., Sec. 709.

**SEC. 1489.** In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor— Where offer may be made

1. At any place appointed by the creditor; or,
2. Wherever the person to whom the offer ought to be made can be found; or,
3. If such person cannot, with reasonable diligence, be found within this State, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the State; or,
4. If this cannot be done, then at any place within this State.

N. Y. C. C., Sec. 710.

**SEC. 1490.** Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. When offer must be made.

N. Y. C. C., Sec. 711.

**SEC. 1491.** Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. Same.

N. Y. C. C., Sec. 712.

**SEC. 1492.** Where delay in performance is capable of exact and entire compensation, and time has not been ex- Compensation after delay in performance.

pressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime.

This provision, which is new, is intended to obviate the difficulties which constantly arise in determining whether time is of the essence of a contract or not.

This provision [offer of compensation] is also new. But as such tender is permitted by statute after an action has been commenced (2 R. S., 554, Sec. 20), it clearly ought to be allowed before any litigation is had, to stop interest and avoid costs. Undoubtedly it is not allowed by the common law (*Poole vs. Tumbridge*, 2 M. & W., 223; *Hume vs. Pepploe*, 8 East, 168); but the Judges acknowledged the hardship of the law on this point. In Connecticut the rule here proposed has become law through usage (*Tracy vs. Strong*, 2 Conn., 659).

N. Y. C. C., Sec. 713.

Offer to be made in good faith.

SEC. 1493. An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor.

N. Y. C. C., Sec. 714.

Conditional offer.

SEC. 1494. An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

N. Y. C. C., Sec. 715.

Ability and willingness essential.

SEC. 1495. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.

All the precedents assume this to be essential. Ability, however, and not readiness, is the true test. If a debtor knows that his creditor will not accept performance, he should not be required to prepare anything for delivery, at a useless cost of time and trouble.

N. Y. C. C., Sec. 716.

Production of thing to be delivered, not necessary.

SEC. 1496. The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted.

This is an innovation upon the common law, as far as obligations for the payment of money (*Bakeman vs. Pooler*, 15 Wend., 637; *Hornby vs. Cramer*, 12 How. Pr., 491; *Finch vs. Brook*, 1 Bing. N. C., 253), or for the delivery of a written instrument (see *Brooklyn Bank vs. Degrauw*, 23 Wend., 342), are concerned. But the present rule seems useless. In respect to bulky articles, this section is in conformity with the common law (*Slingerland vs. Morse*, 8 Johns., 474; *Myers vs. Davis*, 26 Barb., 367; *Coit vs. Houston*, 3 Johns. Cas., 243).

N. Y. C. C., Sec. 717.

**Sec. 1497.** A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty.

Thing offered, to be kept separate.

N. Y. C. C., Sec. 718.

**Sec. 1498.** When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition.

Performance of condition precedent.

N. Y. C. C., Sec. 719.

**Sec. 1499.** A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

Written receipts.

This provision is new. Its propriety should seem scarcely to admit of doubt.

N. Y. C. C., Sec. 720.

**Sec. 1500.** An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor.

Extinction of pecuniary obligation.

This is contrary to the present law upon this subject, which makes a tender operative only so far as to stop interest. The same rule has been applied to obligations for the delivery of deeds and other instruments (*Brooklyn Bank vs. De Grauw*, 23 Wend., 342). But this has been wisely overruled (*Des Arts vs. Leggett*, 16 N. Y., 532). The provision of this section have long been the law, in substance, of Louisiana and France. It seems to the Commissioners to be all that creditors can reasonably ask. The common law compels a debtor to keep the money which he owes, at his own risk. This is often an inconvenience, and sometimes a positive loss to him.

N. Y. C. C., Sec. 721.

**Sec. 1501.** All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated.

Objections to mode of offer.

N. Y. C. C., Sec. 722.

**Sec. 1502.** The title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

Title to thing offered

*Des Arts vs. Leggett*, 16 N. Y., 532; *Lamb vs. Lathrop*, 13 Wend., 95; *Rix vs. Strong*, 1 Root, 55; see *Smith vs.*

Loomis, 7 Conn., 110. At present this rule does not apply to money, but that is because a tender does not extinguish a pecuniary debt. The change proposed by Sec. 721 removes the ground of this distinction.

N. Y. C. C., Sec. 723.

NOTE.—See Sec. 1500 of this Code.

Custody  
of thing  
offered.

SEC. 1503. The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person.

N. Y. C. C., Sec. 724.

Effect of  
offer on  
accessories  
of obligation

SEC. 1504. An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.

N. Y. C. C., Sec. 725.

Creditor's  
retention of  
thing which  
he refuses to  
accept.

SEC. 1505. If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand; but if he retains it, he is a gratuitous depositary thereof.

N. Y. C. C., Sec. 726.

## CHAPTER III.

### PREVENTION OF PERFORMANCE OR OFFER.

SECTION 1511. What excuses performance, etc.

1512. Effect of prevention of performance.

1513. Same.

1514. Same.

1515. Effect of refusal to accept performance before offer.

What ex-  
cuses per-  
formance,  
etc.

SEC. 1511. The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse.

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this State or of the United States, unless the parties have expressly agreed to the contrary; or,

3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

N. Y. C. C., Sec. 727.

SEC. 1512. If performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained by its performance on both sides.

Effect of prevention of performance.

N. Y. C. C., Sec. 728.

SEC. 1513. If a debtor is dissuaded by his creditor from performance, but is not actually forbidden to perform, he may, at his option, omit to perform, and retain whatever he has received under the contract, but he is entitled to nothing more.

Same.

N. Y. C. C., Sec. 729.

SEC. 1514. If performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

Same.

N. Y. C. C., Sec. 730.

SEC. 1515. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

Effect of refusal to accept performance before offer.

N. Y. C. C., Sec. 731.

## CHAPTER IV.

## ACCORD AND SATISFACTION.

SECTION 1521. Accord, what.

1522. Effect of accord.

1523. Satisfaction, what.

1524. Accord of liquidated debt.

Accord,  
what.

SEC. 1521. An accord is an agreement to accept, in extinction of an obligation, something to which the person agreeing to accept is not otherwise entitled.

N. Y. C. C., Sec. 732.

Effect of  
accord.

SEC. 1522. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

N. Y. C. C., Sec. 733.

Satisfaction,  
what.

SEC. 1523. Acceptance, by the creditor, of the consideration of an accord, extinguishes the obligation, and is called satisfaction.

Hall vs. Flockton, 16 Q. B., 1039; Jones vs. Sawkins, 5 C. B., 142. Though an accord and satisfaction is not at common law a defence to a claim founded upon a record or specialty (Mitchell vs. Hawley, 4 Den., 414), the Commissioners do not think it wise to retain this distinction.

N. Y. C. C., Sec. 734.

NOTE.—Sealed instruments are abolished by this Code, (Sec. 1096.) A *specialty* referred to in the above note of the New York revisers is by our Sec. 1096 on the same footing with simple contracts.

Accord of  
liquidated  
debt.

SEC. 1524. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, extinguishes the obligation.

Stats. 1868, 31.

NOTE.—This section is the alternate section or "substitute," proposed by the New York Commission. The section of their text (Sec. 735) and its note are as follows:

SEC. 735. Payment of an amount less than that of a liquidated debt then payable, is not a satisfaction thereof, though accepted as such.

"Palmerston vs. Huxford, 4 Denio, 166; Neary vs. Boetwick, 2 Hilt., 514; see Evans vs. Powis, 1 Exch., 601; Wilkinson vs. Byers, 1 Ad. & El., 106; Brooks vs. White, 3 Metc., 286; Goodnow vs. Smith, 18 Pick., 414; Smith vs. Brown, 3 Hawks, 580; Von Gerhard vs. Lighte, 13 Abb.

Pr., 101; *Harrison vs. Wilcox*, 2 Johns, 448; *Dederick vs. Leman*, 9 id., 333; *Scott vs. Hunt*, 2 How. Pr., 58; *Down vs. Hatcher*, 10 Ad. & El., 121; *Thomas vs. Heathorn*, 2 B. & C., 477; *Fitch vs. Sutton*, 5 East, 230; *Cumber vs. Wane*, 1 Str., 426. This rule of the common law is not founded upon natural justice, nor can it be supported upon any other than technical grounds. An agreement to accept a barrel of flour in satisfaction of a debt of \$1,000 is valid, and if the flour is delivered the debt is satisfied. So a release under seal, without any consideration, extinguishes the debt. But an agreement to accept \$999 in satisfaction of the debt is unavailing, and the obligation to pay the other dollar is unimpaired. In Pennsylvania, the rule has been disavowed for over thirty years past (*Milliken vs. Brown*, 1 Rawle, 391). It has been abolished in Maine, by statute (Laws 1851, ch. 213). The Commissioners recommend the omission of this section, and the insertion of the following substitute."

## CHAPTER V.

### NOVATION.

Section 1530. Novation, what.

1531. Modes of novation.

1532. Consideration for novation presumed, when.

1533. Intent presumed.

1534. Completed novation operates, how.

1535. Novation a contract.

1536. Rescission of novation.

Sec. 1530. Novation is the substitution of a new obligation for an existing one.

Novation,  
what.

N. Y. C. C., Sec. 736.

Sec. 1531. Novation is made—

Modes of  
novation.

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation.

2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,

3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

N. Y. C. C., Sec. 737.

NOTE.—This section, from the New York Code, is modified by omitting the words "and higher" after the word "new," in the first subdivision. All distinction between sealed and unsealed instruments is abolished. See Sec. 1096 of this Code.

Consideration for novation presumed, when

SEC. 1532. The old obligation, the mutual relation of the parties and the mutual advantages expectant from the new obligation, constitute a sufficient consideration to support novation.

[New section.]

NOTE.—The following is Sec. 739 of the New York Civil Code:

“SEC. 739. The acceptance, by a creditor, of a new obligation of the debtor for the payment of money only, in satisfaction of another obligation of as high degree, for the payment of a specific sum of money only, then payable, does not extinguish the latter obligation (unless accepted as a satisfaction under Sec. 735), but extends the time of payment until the new obligation becomes payable.”

We have adopted the New York alternate for their Sec. 735. If the parties agree that a new obligation should satisfy an old one for the same debt, why should the law interfere? Is not the old obligation sufficient consideration to support the new one?

Intent presumed.

SEC. 1533. When the new contract is made, the intent mentioned in Sec. 1551 is presumed, until the contrary appears, or unless such presumption operates to discharge an encumbrance, security or surety.

[New section.]

Completed novation operates, how

SEC. 1534. When novation is complete it operates as satisfaction of the pre-existing obligation.

[New section.]

Novation a contract.

SEC. 1535. Novation is made by contract, and is subject to all the rules concerning contracts in general.

N. Y. C. C., Sec. 738.

Rescission of novation.

SEC. 1536. When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance, if the debtor prevents such person from complying with the order, or from fulfilling the obligation; or if, before the creditor can, with reasonable diligence, reach such person, he becomes insolvent.

N. Y. C. C., Sec. 740.

## CHAPTER VI.

### RELEASE.

SECTION 1541. Obligation extinguished by release.

1542. Certain claims not affected by general release.

1543. Release of several joint debtors.



**SEC. 1541.** An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.

Obligation  
extinguished  
by release.

A release under seal extinguishes the debt, notwithstanding the provision of the Revised Statutes, allowing the want of consideration for a sealed instrument to be shown (*Stearns vs. Tappin*, 5 Buer, 294). But by the present law, a release, with neither a seal nor a new consideration, is void (*Von Gerhard vs. Lighte*, 13 Abb. Pr., 101; *Seymour vs. Minturn*, 17 Johns., 169; *Dewey vs. Derby*, 20 id., 462; *Jackson vs. Stackhouse*, 1 Cow., 122). The justice of its restrictions may well be doubted. The Commissioners recommend the substitution of the words "in writing" for "under seal."

N. Y. C. C., Sec. 741.

• **NOTE.**—See note to Sec. 1524 of this Code. In this instance, the New York section and note accords with our abolition of seals. (Stats. 1867, 31.)

**SEC. 1542.** A general release does not extend to claims which the creditor did not know or suspect to exist in his favor at the time of executing the release.

Certain  
claims not  
affected by  
general re-  
lease.

N. Y. C. C., Sec. 742.

**SEC. 1543.** A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him.

Release of  
several joint  
debtors.

This provision is new (see *Cornell vs. Masten*, 35 Barb., 157; *Bronson vs. Fitzhugh*, 1 Hill, 185; *Hoffman vs. Dunlop*, 1 Barb., 185; *Parsons vs. Hughes*, 9 Paige, 591; *Catskill Bank vs. Messenger*, 9 Cow., 37; *Rowley vs. Stoddard*, 7 Johns., 207). By statute, a release *may* be so drawn as to discharge one only of several joint debtors (3 R. S. [5th ed.], 65; Laws 1838, Chap. 257); and as the intention of the creditor is evident enough from the form of the release, the justice of this provision can hardly be disputed.

N. Y. C. C., Sec. 743.



## II.

1.

CONTRACT.  
ATING CONTRACTS.  
OF CONTRACTS.  
TRACTS.  
CONTRACTS.

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### I.

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ration.

The word "object" has been selected, after much reflection, as a more correct word, for the purpose here intended, than "subject" or "subject matter."

N. Y. C. C., Sec. 745.

## CHAPTER II.

### PARTIES.

SECTION 1556. Who may contract.

1557. Minors, etc.

1558. Identification of parties necessary.

1559. When contract for benefit of third person may be enforced.

Who may  
contract.

SEC. 1556. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

The disabilities of married women are entirely removed by Sec. 79.

N. Y. C. C., Sec. 746.

NOTE.—See Sec. 158 of this Code.

Minors, etc.

SEC. 1557. Minors, and persons of unsound mind, have only such capacity as is defined by Part I of Div. First of this Code.

N. Y. C. C., Sec. 747.

Identifica-  
tion of par-  
ties neces-  
sary.

SEC. 1558. It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them.

N. Y. C. C., Sec. 748.

When con-  
tract for  
benefit of  
third person  
may be en-  
forced.

SEC. 1559. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

N. Y. C. C., Sec. 749.

## CHAPTER III.

### CONSENT.

SECTION 1565. Essentials of consent.

1566. Consent, when voidable.

1567. Apparent consent, when not free.

1568. When deemed to have been obtained by fraud, etc.

1569. Duress, what.

1570. Menace, what.

l or constructive.  
 , what.  
 fraud.  
 a question of fact.  
 nce, what.  
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 oreign laws.  
 consent.  
 ion of consent.  
 municating acceptance of proposal.  
 unication deemed complete.  
 y performances of conditions.  
 must be absolute.  
 of proposal.  
 how made.  
 of contract, void for want of consent.  
 of obligation by acceptance of benefits.

Consent of the parties to a contract Essentials  
of consent.

must be—

1. Free.
2. Mutual; and,
3. Communicated by each to the other.

N. Y. C. C., Sec. 750.

Sec. 1566. A consent which is not free is nevertheless Consent,  
when void-  
able.  
 not absolutely void, but may be rescinded by the parties,  
 in the manner prescribed by the chapter on *Rescission*.

N. Y. C. C., Sec. 751.

Sec. 1567. An apparent consent is not real or free Apparent  
consent,  
when not  
free.  
 when obtained through—

Duress.  
 Menace.  
 Fraud.  
 Undue influence; or,  
 Mistake.

Menace has usually been classed with duress, and will be  
 found to be treated under that head in the digests. It is,  
 however, clearly a separate branch of the subject. Accident  
 and surprise are included under the head of "Mistake."

N. Y. C. C., Sec. 752.

Sec. 1568. Consent is deemed to have been obtained When deem-  
ed to have  
been ob-  
tained by  
fraud, etc.  
 through one of the causes mentioned in the last section,  
 when it would not have been given had such cause  
 existed.

N. Y. C. C., Sec. 753.

Duress,  
what.

Sec. 1569. Duress consists in—

1. Unlawful confinement of the person of the husband or wife of such party, or descendant or adopted child of such party or wife.

2. Unlawful detention of the property of such person; or,

3. Confinement of such person, lawfully obtained, or fraudulently obtained, or fraudulently harassing or oppressive.

N. Y. C. C., Sec. 754.

Menace,  
what.

Sec. 1570. Menace consists in a threat—

1. Of such duress as is specified in Sec. 1569, the last section.

2. Of unlawful and violent injury to the person or property of any such person as is specified in Sec. 1569; or,

3. Of injury to the character of any such person.

This [last] species of threat is not the definition of duress, and was doubtless so at the old common law, when a libeller was kept in jail until he paid damages, while his creditor nor any one else was bound to pay him (Dive vs. Maningham, 1 Plowd., 127), and debtors did actually starve to death. The remedy for the recovery of pecuniary claims was considered an adequate satisfaction for injury to property or character, and it was on this account that such injuries were not regarded as duress (1 Stark. Ev., 482; Chitt. Cont., 208). The remedy now existing is less effective, and such injuries were considered equivalent to character injury, and now a criminal offence to send threat for the purpose of extorting money, and that as a crime ought not to be allowed. These views are further sustained by 1 Stark. Ev., 482; Chitt. Cont., 208. Shummon, 28 N. Y., 9, in which some of the influence of a threat involving the loss of character.

N. Y. C. C., Sec. 755.

Fraud, ac-  
tual or con-  
structive

Sec. 1571. Fraud is either actual or constructive.

N. Y. C. C., Sec. 756.

Actual  
fraud, what.

Sec. 1572. Actual fraud, within the meaning of this chapter, consists in any of the following:—  
1. By a party to the contract, or with his consent, to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

assertion, in a manner not warranted  
of the person making it, of that which  
he believes it to be true.

of that which is true, by one having  
of the fact.

without any intention of perform-

mitted to deceive.

L. C., Sec. 757.

Constructive fraud consists—

Constructive  
fraud.

of duty which, without an actually  
wins an advantage to the person in  
claiming under him, by misleading  
advice, or to the prejudice of any one  
or,

act or omission as the law specially  
demand, without respect to actual fraud.

L. C., Sec. 758.

Actual fraud is always a question of fact.

Actual fraud  
a question  
of fact.

L. C., Sec. 759.

Undue influence consists—

Undue influ-  
ence, what.

one in whom a confidence is reposed  
holds a real or apparent authority  
confidence or authority for the purpose  
of his advantage over him.

unfair advantage of another's weak-

sely oppressive and unfair advantage  
in or distress.

*Subd. 1.*—It may safely be stated as a general  
principle, that no one can be permitted to make any  
use of a personal confidence reposed in him. This  
is illustrated in a variety of forms, and sustained by  
authorities, in the Title on *Trusts*. But it is also  
to be recognized in this place. It is not necessary,  
in cases, to show that there was any deception prac-  
ticed; it is sufficient to show that the confidence reposed  
was for purposes of gain (see *Sears vs.*  
*N. Y.*, 268, 272; *Bergen vs. Udall*, 31 Barb., 9;  
*J. Barnes*, 40 Barb., 521; *Baker vs. Bradley*, 7  
*N. & G.*, 597; *Tyrrell vs. Bank of London*, 10 H. of  
26; *Dent vs. Bennett*, 4 Myl. & Cr., 269; 7 Sim.,  
*Don vs. Kennedy*, 9 Jur. [N. S.], 1163; *Davies vs.*  
*Id.*, 1002.)

parent may not acquire anything from his child by  
test exercise of parental authority (*Bury vs. Op-*

penheim, 26 Beav., 594; Bergen vs. Udall, 31 Barb., 9; Taylor vs. Taylor, 8 How. [U. S.], 183; Baker vs. Bradley, 7 De G., M. & G., 597; see Broun vs. Kennedy, 9 Jur. [N. S.], 1163; Davies vs. Davies, id., 1002); and the same rule applies to any one standing in the relation of a parent (Archer vs. Hudson, 7 Beav., 551), as an uncle with whom his niece lived for a number of years (id.), or an elder sister who had a great ascendancy over the mind of the grantor (Harvey vs. Mount, 8 Beav., 439). So a deed from a lady to a clergyman whom she believed to be inspired, was set aside (Nottidge vs. Prince, 2 Giff., 246).

Where agents, appointed by the Comptroller to investigate the condition of an insurance company which had applied to him, pursuant to statute, for leave to do business, after they had made their report, and had in fact no further power, insisted upon the payment of \$300 as fees, threatening to revoke their report if the fees were not paid, it was held that the money paid under such a threat might be recovered back (Am. Ex. Fire Ins. Co. vs. Britton, 8 Bosw., 148; see Steele vs. Williams, 8 Exch., 625; Dew vs. Parsons, 2 B. & Ald., 562; Morgan vs. Palmer, 2 B. & C., 729).

This is all that is necessary. Nothing more than a perverted use of the power of the party need be shown.

*Note to Subd. 2.*—Longmate vs. Ledger, 6 Jur. [N. S.], 481; Blackford vs. Christian, 1 Knapp, 77; see Tracy vs. Sacket, 1 Ohio St., 58; Rippy vs. Grant, 4 Ired. Eq., 443; Whiteburn vs. Hines, 1 Munf., 557; Dunn vs. Chambers, 4 Barb., 376.

*Note to Subd. 3.*—Breck vs. Cole, 4 Sandf., 88; Bowes vs. Heaps, 3 Ves. & B., 119; Wood vs. Abrey, 3 Madd., 423; Gould vs. Okeden, 4 Bro. P. C., 198; see Cockshot vs. Bennet, 2 T. R., 763; Bernardiston vs. Lingood, 2 Atk., 133; Thornhill vs. Evans, id., 330; Walmsley vs. Booth, id., 28, 29; Berney vs. Pitt, 2 Vern., 14; Nott vs. Hill, id., 27; Wiseman vs. Beake, id., 121; Roche vs. O'Brien, 1 Ball & B., 337, 359; Bromley vs. Smith, 26 Beav., 664; 5 Jur. (N. S.), 837; Lamplugh vs. Cox, Dick, 411; Heron vs. Heron, 2 Atk., 160. These cases seem to support this view. They are generally classed under the head of fraud (see Story Eq. Jur., Secs. 331-337); but the principle on which they depend is not a mere question of fraud.

N. Y. C. C., Sec. 760.

Mistake,  
what.

#### SEC. 1576. Mistake may be either of fact or law.

As to mistake of fact there is no question. Mistake of law has been often declared to be no ground for relief at law or in equity (see Champlin vs. Laytin, 13 Wend., 417; Storrs vs. Parker, 6 Johns. Ch., 166; Lyon vs. Richmond, 2 id., 61; Kent vs. Manchester, 29 Barb., 595; Story, Eq. Jur., Secs. 111-139). But the contrary view has been taken by Judges of high authority (see Champlin vs. Laytin, 13 Wend., 422; Many vs. Beekman Iron Co., 9 Paige, 188; Stone vs. Godfrey, 5 De G., M. & G., 90; Broughton vs. Hutt, 3 De G. & J., 501; Evans vs. Strode, 11 Ohio, 450. See, also, Wheeler vs. Smith, 9 How. [U. S.], 55). The Commissioners think that the latter cases are better considered. No doubt relief upon this ground must be granted with extreme caution, and in only a limited class of cases; but this by no means proves that such relief should never be granted.

N. Y. C. C., Sec. 761.

Mistake  
of fact.

#### SEC. 1577. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in—



is ignorance or forgetfulness of a fact material to the contract; or, present existence of a thing material which does not exist, or in the past existing, which has not existed.

C. C., Sec. 762.

Mistake of law constitutes a mistake, according to this article, only when it arises

Mistake of law.

in error of the law by all parties, all supposing and understood it, and all making the same mistake as to the law; or, in error of the law by one party, of which the other is ignorant at the time of contracting, but which may be rectified.

to Subd. 1.—*Many vs. Beskman Iron Co.*, 2 Paige, 501; *all vs. Reed*, 2 Barb. Ch., 501; see *Pitcher vs. Tunk Road Co.*, 10 Barb., 436; *Wake vs. Harrop*, 6 H. 68.

to Subd. 2.—In *Cooke vs. Nathan* (16 Barb., 342), it is held that a misrepresentation of the law by one party, which the other ignorantly relied, was a fraud. It follows that a transaction such as is described in this article should be relieved against, as a mistake, if not as

C. C., Sec. 763.

Mistake of foreign laws is a mistake of

Mistake of foreign laws.

C. C., Sec. 764.

Consent is not mutual, unless the parties agree to the same thing in the same sense. But in cases provided for by the chapter on *Interpretation*, they may be held to agree without regard to the fact.

Mutuality of consent.

C. C., Sec. 765.

Consent can be communicated with effect, by the declaration or omission of the party contracting, or by the fact of his communicating it, or which necessitates communication.

Communication of consent.

This article is intended to exclude the possible case of a declaration of consent made to a person having no interest in the thing, and communicated by him to the other party by his authority.

C. C., Sec. 766.

The mode of communication prescribed by this article for the proposal prescribes any conditions concerning its acceptance, the pro-

Mode of communicating acceptance of proposal.

poser is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

N. Y. C. C., Sec. 767.

When communication deemed complete.

SEC 1583. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.

This section is intended to recognize the rule that consent is complete as soon as a letter of acceptance is put into the Post-office.

N. Y. C. C., Sec. 768.

Acceptance by performance of conditions.

SEC. 1584. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.

N. Y. C. C., Sec. 769.

Acceptance must be absolute.

SEC. 1585. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal.

N. Y. C. C., Sec. 770.

Revocation of proposal.

SEC. 1586. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

N. Y. C. C., Sec. 771.

Revocation, how made.

SEC. 1587. A proposal is revoked—

1. By the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Secs. 1581 and 1583, before his acceptance has been communicated to the former.

2 By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance.

3. By the failure of the acceptor to fulfil a condition precedent to acceptance; or,

4. By the death or insanity of the proposer.

N. Y. C. C., Sec. 772.

at which is voidable solely for want  
ratified by a subsequent consent.

, Sec. 773.

Ratification  
of contract,  
void for want  
of consent.

Sec. 1589. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.

Assumption  
of obligation  
by accept-  
ance of ben-  
efits.

N. Y. C. C., Sec. 774; *Bennett vs. Judson*, 21 N. Y., 238.

## CHAPTER IV.

### OBJECT OF A CONTRACT.

Section 1595. Object, what.

1596. Requisites of object.

1597. Impossibility, what.

1598. When contract wholly void.

1599. When contract partially void.

Sec. 1595. The object of a contract is the thing which it is agreed, on the part of the party receiving the con-  
on, to do or not to do.

Object, what.

N. Y. C. C., Sec. 775; *Martin vs. McCormick*, 8 N. Y., 335.

596. The object of a contract must be lawful  
ie contract is made, and possible and ascertain-  
the time the contract is to be performed.

Requisites  
of object.

N. Y. C. C., Sec. 776.

NOTE.—For a definition of the word "lawful," see Chap.  
V, of this Title.

597. Everything is deemed possible, except that  
impossible in the nature of things.

Impossibil-  
ity, what.

Impossibility is to be determined, not by the means or ability of the party, but by the nature of things (Code La., 1885, 2028; see *McNeill vs. Reed*, 9 Bing., 68; *Beebe vs. Johnson*, 19 Wend., 500; *Harmony vs. Bingham*, 12 N. Y., 99; *Warfield vs. Watkins*, 30 Barb., 395; *Tufnell vs. Constable*, 7 Ad. & El., 798). Thus a promise to procure the assent of a third person to any lawful and proper act is valid (*Lloyd vs. Crispe*, 5 Taunt., 249; *McNeill vs. Reed*, 9 Bing., 68).

N. Y. C. C., Sec. 777.

1598. Where a contract has but a single object,  
a object is unlawful, whether in whole or in part,

When con-  
tract wholly  
void.

or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

N. Y. C. C., Sec. 778.

When contract partially void.

SEC. 1599. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful in whole or in part, the contract is void as to the latter and valid as to the rest.

N. Y. C. C., Sec. 779.

## CHAPTER V.

### CONSIDERATION.

SECTION 1605. Good consideration, what.

1606. How far legal or moral obligation is a good consideration.

1607. Consideration lawful.

1608. Effect of its illegality.

1609. Consideration executed or executory.

1610. Executory consideration.

1611. How ascertained.

1612. Effect of impossibility of ascertaining consideration.

1613. Same.

Good consideration, what

SEC. 1605. Any benefit conferred, or agreed to be conferred, upon the promiser, by any other person, to which the promiser is not lawfully entitled; or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promiser, is a good consideration for a promise.

N. Y. C. C., Sec. 780.

How far legal or moral obligation is a good consideration.

SEC. 1606. An existing legal obligation resting upon the promiser, or a moral obligation originating in some benefit conferred upon the promiser, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.

The common law does not recognize moral obligations, except in a few cases, as sufficient to sustain a promise (Nash vs. Russell, 5 Barb., 556; Geer vs. Archer, 2 Barb., 420; Watkins vs. Halstead, 2 Sandf., 311; Ehle vs. Judson, 24 Wend., 97; Smith vs. Ware, 13 Johns., 257; Beaumont vs. Reeve, 8 Q. B., 483; Eastwood vs. Kenyon, 11 Ad. & El., 438. But see, to the contrary, Doty vs. Brown, 14 Johns., 381; Lee vs. Muggeridge, 5 Taunt., 36). The

however, entirely fail to establish any satisfactorily upon which to distinguish between the different moral obligations. Thus, in *Bunn vs. Winchona*, Ch., 329), past seduction was held a good consideration to support a grant. In *Beaumont vs. Reeve* (33) the same consideration was held insufficient for a promise. In *Goulding vs. Davidson* (28 Barb., 147), it was said that there must have been, at some time, an actual obligation. Yet in *Rice vs. Welling* (5 Wend., 417), and *Early vs. Mahon* (19 Johns., 147), the original contract was held valid, and therefore void from the beginning. The same may be said of promises to pay debts contracted before the act, which are held valid. *Goulding vs. Davidson* (26 N. Y., 604). The rule stated in the act to the Commissioners to be just, and to be, as easily reconcilable with the authorities in any other that can be devised.

C., Sec. 781.

Consideration of a contract must be lawful.

Consideration lawful.

C., Sec. 782.

part of a single consideration for one purpose, or of several considerations for a single purpose, the entire contract is void.

Effect of its illegality.

Principle is deducible from all the cases taken together, though not to be found thus stated in any one case. It is no doubt that, if the consideration is single, and the words indivisible, its partial illegality is fatal to the contract (*Mills vs. Mills*, 36 Barb., 474; *Rose vs. Rose*, 36 id., 361; *Pepper vs. Haight*, 20 id., 429; *Barton vs. Jackson Plank Road Co.*, 17 id., 397; *Burt vs. Burt*, 431; see *Brown vs. Brown*, 34 Barb., 533; *Havens*, 37 id., 343). The limitations of the act are conformable to the principle of Secs. 778 and 779.

C., Sec. 783.

Consideration may be executed or executory. In so far as it is executory, it is governed by the provisions of Chap. IV of this Title.

Consideration executed or executory.

C., Sec. 784.

When a consideration is executory, it is necessary that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person, or regulated by any specified standard.

Executory consideration.

There is perhaps no precedent for a general provision of this kind [specified standard] under the head of contracts. But finding it necessary to repeat the same section, almost word for word, under the various heads of Sale, Hire, Employment, Deposit, Carriage and Insurance, and perceiving no reason why it would work injustice if applied to other contracts, although in practice it probably is not needed for them, the Commissioners have ventured to transfer it to this part of the Code; to which, they think, it properly belongs.

N. Y. C. C., Sec. 785.

How ascer-  
tained.

SEC. 1611. When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

N. Y. C. C., Sec. 786.

Effect of im-  
possibility  
of ascertain-  
ing consid-  
eration.

SEC. 1612. Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.

N. Y. C. C., Sec. 787.

Same.

SEC. 1613. Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision only is void.

Pothier (Sale, n. 34) holds that the contract in such case is voidable, and this view has been adopted by some writers in this country (Story on Sales, Sec. 220 ; 1 Pars. Cont., 5th ed., 525), but it seems more probable that the common law would regard the contract as made for a reasonable consideration, to be ascertained in any usual way. Thus, where a covenant to renew a lease provides for an arbitration to determine the rent, and no award is ever made, the Court will enforce the renewal at a reasonable rent (Reformed Dutch Church vs. Parkhurst, 4 Bosw., 491 ; Dunnell vs. Keteltas, 16 Abb. Pr., 205.)

N. Y. C. C., Sec. 788.

## TITLE II.

### MANNER OF CREATING CONTRACTS.

SECTION 1619. Contracts express or implied.

1620. Express contract, what.

1621. Implied contract, what.

1622. What contracts may be oral.

1623. Contract not in writing through fraud, may be enforced against fraudulent party.

1624. What contracts must be written.

1625. Effect of writing.

1626. Contract in writing, takes effect when.

1627. Provisions of chapter on transfers of real property.

1628. Corporate seal, how affixed.

1629. Provisions abolishing seals made applicable.

**SEC. 1619.** A contract is either express or implied.

N. Y. C. C., Sec. 789.

Contracts  
express or  
implied.

**SEC. 1620.** An express contract is one, the terms of which are stated in words.

N. Y. C. C., Sec. 790.

Express con-  
tract, what.

**SEC. 1621.** An implied contract is one, the existence and terms of which are manifested by conduct.

Implied con-  
tract, what.

The ordinary definition of an implied contract includes obligations imposed by law upon parties, as between each other. These obligations are, however, considered in another part of the Code.

N. Y. C. C., Sec. 791.

**SEC. 1622.** All contracts may be oral, except such as are specially required by statute to be in writing.

N. Y. C. C., Sec. 792.

What con-  
tracts may  
be oral.

**SEC. 1623.** Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto. any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

Contract not  
in writing  
through  
fraud, may  
be enforced  
against  
fraudulent  
party.

This principle of equity ought to be recognized in all cases, whether legal or equitable.

N. Y. C. C., Sec. 793.

**SEC. 1624.** The following contracts, or some memorandum thereof, expressing the parties, their consent and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose :

What con-  
tracts must  
be written.

1. An agreement that, by its terms, cannot be fully performed within one year.

2. An agreement to answer for the debt, default or mis-carriage of another.

3. An agreement made upon consideration of marriage, other than mutual promises to marry.

4. An executory contract of marriage.

**NOTE.**—Subds. 1 and 3 are in the language of the New York Civil Code, Sec. 794. They modify Subds. 1 and 3 of Sec. 12, "Fraudulent Conveyances." The reasons are assigned in the note of the New York revisers, as follows :

"The consideration is no longer necessary to be stated (Laws of 1863, ch. 464). Such at least was the undoubted intention of the Legislature, though under the decision in *Wain vs. Warlters* (5 East, 10), it is difficult to say whether its intention is plainly expressed. The language here proposed is unmistakable in its meaning.

"The names of all the parties must be stated in the memorandum (*Williams vs. Lake*, 2 El. & El., 349).

"The whole object of the contract, and all its terms, must be expressed (*Wright vs. Weeks*, 25 N. Y., 153).

"The language of the statute is 'is not to be,' etc. It is construed as applying only to contracts which cannot possibly be executed within a year, under any contingency (*Dresser vs. Dresser*, 35 Barb., 573; *Archer vs. Zeh*, 5 Hill, 209; *Plimpton vs. Curtiss*, 15 Wend., 336; *McLees vs. Hale*, 10 id., 426; *Moore vs. Fox*, 10 Johns., 244. Compare *Day vs. N. Y. Central R. R.*, 31 Barb., 548; *Pitkin vs. Long Island R. R.*, 2 Barb., Ch. R., 221; see *Talmadge vs. Rensselaer and Saratoga R. R.*, 13 Barb., 593).

"*Day vs. N. Y. Central R. R.*, 31 Barb., 548, 556; *Amburger vs. Marvin*, 4 E. D. Smith, 393; *Lockwood vs. Barnes*, 3 Hill, 128; *Broadwell vs. Getman*, 2 Den., 87; *Bracegirdle vs. Heald*, 1 Barn. & Ald., 722.

"The words 'from the making thereof,' are omitted in order to harmonize the rules in relation to contracts affecting both real and personal property, which are now governed by different provisions on this point (*Young vs. Dake*, 6 N. Y., 463; overruling *Croswell vs. Crane*, 7 Barb., 191). The Commissioners think, moreover, that the strictness of this provision has worked injustice. Few yearly contracts go into effect instantly."

Subd. 2 is the second subdivision of Sec. 12, "Fraudulent Conveyances." See, also, *Guaranty*.

Subd. 3 is a new provision. This has been inserted upon recommendation of eminent lawyers, to prevent scandalous exposures of past confidential relations in actions for breach of promise, denying the action, except when there is a written contract. Of course an agreement to marry *de presenti*, followed by cohabitation, makes valid marriage an executed contract, under Sec. —.

Effect of  
writing.

SEC. 1625. The execution of a contract in writing, whether the law requires it to be written or not, supercedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument.

N. Y. C. C., Sec. 795.

Contract in  
writing,  
takes effect  
when.

SEC. 1626. A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.

N. Y. C. C., Sec. 796.

Provisions  
of chapter on  
transfers of  
real prop-  
erty.

SEC. 1627. The provisions of the chapter on *Transfers in General*, concerning the delivery of grants, absolute and conditional, apply to all written contracts.

N. Y. C. C., Sec. 797.



**SEC. 1628.** A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

Corporate seal, how affixed.

N. Y. C. C., Sec. 798.

**SEC. 1629.** Secs. 1096 and 1097, concerning private seals and prima facie consideration, are applicable to all written contracts.

Provisions abolishing seals made applicable.

[New section.]

## TITLE III.

### INTERPRETATION OF CONTRACTS.

**SECTION 1635.** Uniformity of interpretation.

- 1636. Contracts, how to be interpreted.
- 1637. Intention of parties, how ascertained.
- 1638. Intention to be ascertained from language.
- 1639. Interpretation of written contracts.
- 1640. Writing, when disregarded.
- 1641. Effect to be given to every part of contract.
- 1642. Several contracts, when taken together.
- 1643. Interpretation in favor of contract.
- 1644. Words to be understood in usual sense.
- 1645. Technical words.
- 1646. Law of place.
- 1647. Contracts explained by circumstances.
- 1648. Contract restricted to its evident object.
- 1649. Interpretation in sense in which promiser believed promisee to rely.
- 1650. Particular clause subordinate to general intent.
- 1651. Contract, partly written and partly printed.
- 1652. Repugnancies, how reconciled.
- 1653. Inconsistent words rejected.
- 1654. Words to be taken most strongly against whom.
- 1655. Reasonable stipulations, when implied.
- 1656. Necessary incidents implied.
- 1657. Time of performance of contract.
- 1658. Time, when of essence.
- 1659. When joint and several.
- 1660. Same.
- 1661. Executed and executory contracts, what.

**SEC. 1635.** All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code.

Uniformity of interpretation.

Some distinctions are made at common law, which have no substantial foundation in reason. Thus, an instrument

under seal, signed by an agent in his own name, does not bind his principal (*Townsend vs. Hubbard*, 4 Hill, 351; *Townsend vs. Corning*, 22 Wend., 435; *Berkley vs. Hardy*, 5 B. & C., 355), though a contract not under seal, signed in this manner, would bind him (*Stanton vs. Camp*, 4 Barb., 274; see *Evans vs. Wells*, 22 Wend., 324; *Townsend vs. Hubbard*, 4 Hill, 351). In Connecticut, this technical distinction does not exist (*Magill vs. Hinesdale*, 6 Conn., 464).  
N. Y. C. C., Sec. 800.

NOTE.—The words “sealed or unsealed” are struck out, but the note to the New York section is retained, as it shows additional reasons for abolishing seals.

Contracts,  
how to be  
interpreted.

SEC. 1636. A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.

N. Y. C. C., Sec. 801.

Intention of  
parties, how  
ascertained.

SEC. 1637. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.

N. Y. C. C., Sec. 802.

Intention to  
be ascer-  
tained from  
language

SEC. 1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

N. Y. C. C., Sec. 803.

Interpreta-  
tion of writ-  
ten con-  
tracts.

SEC. 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

N. Y. C. C., Sec. 804.

Writing,  
when disre-  
garded.

SEC. 1640. When, through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

N. Y. C. C., Sec. 805.

Effect to be  
given to  
every part  
of contract.

SEC. 1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others.

N. Y. C. C., Sec. 806.

Several con-  
tracts, when  
taken to-  
gether.

SEC. 1642. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.

N. Y. C. C., Sec. 807.

**Sec. 1643.** A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties.

N. Y. C. C., Sec. 808.

Interpretation in favor of contract.

**Sec. 1644.** The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

N. Y. C. C., Sec. 809.

Words to be understood in usual sense.

**Sec. 1645.** Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

N. Y. C. C., Sec. 810.

Technical words.

**Sec. 1646.** A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

N. Y. C. C., Sec. 811.

Law of place.

**Sec. 1647.** A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

N. Y. C. C., Sec. 812.

Contracts explained by circumstances.

**Sec. 1648.** However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

N. Y. C. C., Sec. 813.

Contract restricted to its evident object.

**Sec. 1649.** If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promiser believed, at the time of making it, that the promisee understood it.

N. Y. C. C., Sec. 814.

Interpretation in sense in which promiser believed promisee to rely.

**Sec. 1650.** Particular clauses of a contract are subordinate to its general intent.

N. Y. C. C., Sec. 815.

Particular clause subordinate to general intent.

Contract,  
partly writ-  
ten and part-  
ly printed.

SEC. 1651. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.

N. Y. C. C., Sec. 816.

Repugnan-  
cies, how  
reconciled.

SEC. 1652. Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.

N. Y. C. C., Sec. 817.

Inconsistent  
words re-  
jected.

SEC. 1653. Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.

N. Y. C. C., Sec. 818.

Words to be  
taken most  
strongly  
against  
whom.

SEC. 1654. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promiser is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

N. Y. C. C., Sec. 819.

Reasonable  
stipulations,  
when im-  
plied.

SEC. 1655. Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.

N. Y. C. C., Sec. 820.

Necessary  
incidents  
implied.

SEC. 1656. All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom; unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

N. Y. C. C., Sec. 821.

**SEC. 1657.** If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly, as for example, if it consists in the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained.

Time of performance of contract.

N. Y. C. C., Sec. 822.

**SEC. 1658.** Time is never considered as of the essence of a contract, unless by its terms expressly so provided.

Time, when of essence.

This provision is new. As to the present law upon the subject, see Story Eq. Jur., Sec. 776. It is involved in so much difficulty, that the Commissioners deem it wise to adopt this more stringent rule.

N. Y. C. C., Sec. 823.

**SEC. 1659.** Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.

When joint and several.

N. Y. C. C., Sec. 824.

**SEC. 1660.** A promise, made in the singular number, but executed by several persons, is presumed to be joint and several.

Same.

N. Y. C. C., Sec. 825.

**SEC. 1661.** An executed contract is one, the object of which is fully performed. All others are executory.

Executed and executory contracts, what.

N. Y. C. C., Sec. 826.

## TITLE IV.

### UNLAWFUL CONTRACTS.

**SECTION 1667.** What is unlawful.

1668. Certain contracts unlawful.

1669. Penalties void.

1670. Contract fixing damages, void.

1671. Exception.

1672. Restraints upon legal proceedings.

1673. Contract in restraint of trade, void.

1674. Exception in favor of sale of good will.

1675. Exception in favor of partnership arrangements.

1676. Contract in restraint of marriage, void.

What is  
unlawful.

SEC. 1667. That is not lawful which is—

1. Contrary to an express provision of law.
2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals.

N. Y. C. C., Sec. 827.

Certain con-  
tracts un-  
lawful.

SEC. 1668. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law.

N. Y. C. C., Sec. 828.

Penalties  
void.

SEC. 1669. Penalties imposed by contract for any non-performance thereof, are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses.

N. Y. C. C., Sec. 829.

Contract  
fixing dam-  
ages, void.

SEC. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

N. Y. C. C., Sec. 830.

Exception.

SEC. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

The use of the phrase "liquidated damages" leads frequently to an evasion of the law in respect to penalties. The Courts, not venturing to declare such contracts void, constantly discourage them. They are oppressive and unconscientious, except in the cases permitted above, and ought not to be allowed. The restrictions imposed by this section are, however, new (see *Bagley vs. Peddie*, 16 N. Y., 469; *Lampman vs. Cochran*, id., 275).

N. Y. C. C., Sec. 831.

Restraints  
upon legal  
proceedings.

SEC. 1672. Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

The first part of this section is acknowledged law. A covenant in a contract, not to sue for a breach thereof, is void. The latter provision is new. The question involved has been variously decided in different tribunals, with a preponderance of opinion in favor of the right to limit the time of commencing actions, as a matter of law, but with frequent disapprobation of the practice. In support of the right, see *Fullam vs. New York Insurance Co.*, 7 Gray, 6; *Brown vs. Roger Williams Insurance Co.*, 5 R. I., 394; *Northwestern Insurance Co. vs. Phoenix O. & C. Co.*, 31 Penn. St., 448; *Portage Insurance Co. vs. West*, 6 Ohio St., 599; *Wilson vs. Aetna Insurance Co.*, 27 Verm., 99; also, *Ames vs. New York Insurance Co.*, 14 N. Y., 266. Against it, see *Eagle Insurance Co. vs. Lafayette Insurance Co.*, 9 Ind., 443; *French vs. Lafayette Insurance Co.*, 5 McLean, 461. The law itself, and the law alone, should regulate the limitations of actions.

N. Y. C. C., Sec. 832.

**SEC. 1673.** Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

Contract in restraint of trade, void.

Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. In *Dunlop vs. Gregory* (10 N. Y., 241), a contract not to run a certain steamboat above Saugerties, on the Hudson, was enforced, although there was no sale of a good will, nor any circumstance to justify the contract, except that it was made upon a sale of a vessel by an association of persons who had previously used it to run above Saugerties, and wished to avoid competition. In *Whittaker vs. Howe* (3 Beav., 387), a contract not to practice law anywhere in England was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the State of the services of its citizens.

N. Y. C. C., Sec. 833.

**SEC. 1674.** One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

Exception in favor of sale of good will.

The district within which a party may exclude himself from carrying on business should be accurately defined by law; and no division of the State appears to the Commissioners to be more reasonable or convenient for this purpose than a county. And no one should be allowed to prevent another from carrying on a business unless he himself provides the public with the same advantages in the same county.

N. Y. C. C., Sec. 834.

**SEC. 1675.** Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or

Exception in favor of partnership arrangements.

town where the partnership business has been transacted, or within a specified part thereof.

An agreement of this description, operating equally upon all the partners, gives to all an opportunity to start anew in business upon equal terms. In such cases, an agreement excluding them all from the county would be too broad. It may even be doubted whether "ward" should not be substituted for "city" in the text.

N. Y. C. C., Sec. 835.

Contract in restraint of marriage, void.

SEC. 1676. Every contract in restraint of the marriage of any person, other than a minor, is void.

Contracts in general restraint of marriage are certainly void (Lowe vs. Peers, 4 Burr., 2225; Hartley vs. Rice, 10 East., 22; Baker vs. White, 2 Verm., 215; Sterling vs. Sinnickson, 2 South., 756; see Conrad vs. Williams, 6 Hill, 444). Perhaps a contract simply in restraint of remarriage of the wife of one of the parties would be held valid in analogy to the rule concerning wills, but experience has shown that such stipulations tend to immorality. Restraints upon the marriage of minors are promotive of prudence, without being burdensome.

N. Y. C. C., Sec. 836.

## TITLE V.

### EXTINCTION OF CONTRACTS.

#### CHAPTER I. CONTRACTS, HOW EXTINGUISHED.

##### II. RESCISSION.

##### III. ALTERATION AND CANCELLATION.

#### CHAPTER I.

##### CONTRACTS, HOW EXTINGUISHED.

##### SECTION 1682. Contract, how extinguished.

Contract, how extinguished.

SEC. 1682. A contract may be extinguished in like manner with any other obligation, and also in the manner prescribed by this Title.

N. Y. C. C., Sec. 827.



## CHAPTER II.

## RESCISSION.

**SECTION 1688.** Rescission extinguishes contract.

1689. When party may rescind.

1690. When stipulations against right to rescind do not defeat it.

1691. Rescission, how effected.

**SEC. 1688.** A contract is extinguished by its rescission.

N. Y. C. C., Sec. 838.

Rescission  
extinguishes  
contract.

**SEC. 1689.** A party to a contract may rescind the same in the following cases only:

When party  
may rescind.

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part.

3. If such consideration becomes entirely void from any cause.

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

5. By consent of all the other parties.

N. Y. C. C., Sec. 839.

**NOTE.**—See Sec. 1115, also Sec. 3307, (rescission of grant on failure of covenant of ownership) in Div. Fourth.

**SEC. 1690.** A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation.

When stip-  
ulations  
against  
right to re-  
scind do not  
defeat it.

N. Y. C. C., Sec. 840.

**SEC. 1691.** Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

Rescission,  
how effected.

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from du-

ress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

N. Y. C. C., Sec. 841.

### CHAPTER III.

#### ALTERATION AND CANCELLATION.

##### SECTION 1697. Alteration by consent.

1698. Sealed contracts, how modified.

1699. Extinction by cancellation, etc.

1700. Extinction by unauthorized alteration.

1701. Alteration of duplicate, not to prejudice.

Alteration  
by consent.

SEC. 1697. A contract may be altered in any respect by consent of the parties, without a new consideration, and is extinguished thereby to the extent of the alteration.

Alterations generally, but not always, consist in the substitution of a new contract for the one that is superseded. Such an alteration is a novation, and is considered under that head.

A consideration is necessary to make an alteration valid at common law. A novation implies a consideration, but an alteration of any other kind amounts only to a partial release without seal. See the chapter on *Release*. Even a mere extension of the time for performance requires a consideration to support it (*Kellogg vs. Olmstead*, 25 N. Y., 189; aff'g S. C., 28 Barb., 96).

N. Y. C. C., Sec. 842.

NOTE.—But see Secs. 1532 and 1533 of this Code, on “Novation.”

Sealed con-  
tracts, how  
modified.

SEC. 1698. A contract in writing may be altered by contract in writing, or by an executed oral agreement; and not otherwise, except as to the time of performance, which may be extended by any form of agreement.

N. Y. C. C., Sec. 843.

Extinction  
by cancella-  
tion, etc.

SEC. 1699. The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof,

extinguishes it as to all the parties consenting to the act. The intent in such case is prima facie presumed.

N. Y. C. C., Sec. 844.

NOTE.—See Sec. 1533 of this Code.

SEC. 1700. The intentional destruction, cancellation or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.

Extinction  
by unau-  
thorized  
alteration.

N. Y. C. C., Sec. 845.

SEC. 1701. Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section.

Alteration  
of duplicate,  
not to preju-  
dice.

N. Y. C. C., Sec. 846.



## PART III.

### OBLIGATIONS IMPOSED BY LAW.

**SECTION 1708.** Abstinence from injury.

1709. Fraudulent deceit.

1710. Deceit, what.

1711. Deceit upon the public, etc.

1712. Restoration of thing wrongfully acquired. .

1713. When demand necessary.

1714. Responsibility for wilful acts, negligence, etc.

1715. Other obligations.

**SEC. 1708.** Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

Abstinence  
from injury.

N. Y. C. C., Sec. 847.

**SEC. 1709.** One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

Fraudulent  
deceit.

N. Y. C. C., Sec. 848.

**SEC. 1710.** A deceit, within the meaning of the last section, is either—

Deceit, what.

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

N. Y. C. C., Sec. 849.

**SEC. 1711.** One who practices a deceit with intent to defraud the public, or a particular class of persons, is

Deceit upon  
the public,  
etc.

deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.

N. Y. C. C., Sec. 850.

Restoration  
of thing  
wrongfully  
acquired.

SEC. 1712. One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

N. Y. C. C., Sec. 851.

When de-  
mand neces-  
sary.

SEC. 1713. The restoration required by the last section must be made without demand; except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

N. Y. C. C., Sec. 852.

Responsibil-  
ity for wilful  
acts, negli-  
gence, etc.

SEC. 1714. Every one is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person; except so far as the latter has, wilfully, or by want of ordinary care, brought the injury upon himself.

N. Y. C. C., Sec. 853.

Other obli-  
gations.

SEC. 1715. Other obligations are prescribed by Divs. First and Second of this Code.

N. Y. C. C., Sec. 854.

# PART IV.

## OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.

### TITLE I. SALE.

#### II. EXCHANGE.

#### III. DEPOSIT.

#### IV. LOAN.

#### V. HIRING.

#### VI. SERVICE.

#### VII. CARRIAGE.

#### VIII. TRUST.

#### IX. AGENCY.

#### X. PARTNERSHIP.

#### XI. INSURANCE.

#### XII. INDEMNITY.

#### XIII. GUARANTY.

#### XIV. LIEN.

#### XV. NEGOTIABLE INSTRUMENTS.

#### XVI. GENERAL PROVISIONS.

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## TITLE I.

### SALE.

#### CHAPTER I. GENERAL PROVISIONS.

##### II. RIGHTS AND OBLIGATIONS OF THE SELLER.

##### III. RIGHTS AND OBLIGATIONS OF THE BUYER.

##### IV. SALE BY AUCTION.

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## CHAPTER I.

### GENERAL PROVISIONS.

#### ARTICLE I. SALE.

##### II. AGREEMENTS FOR SALE.

##### III. FORM OF THE CONTRACT.

## ARTICLE I.

## SALE.

SECTION 1721. Sale, what.

1722. Subject of sale.

Sale, what.

SEC. 1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.

N. Y. C. C., Sec. 855.

Subject  
of sale.

SEC. 1722. The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.

N. Y. C. C., Sec. 856.

## ARTICLE II.

## AGREEMENTS FOR SALE.

SECTION 1726. Agreement for sale.

1727. Agreement to sell.

1728. Agreement to buy.

1729. Agreement to sell and buy.

1730. What may be the subject of the contract.

1731. Agreement to sell real property.

1732. Authority of agent to execute executory contract must be in writing.

1733. Form of grant required by such contract. Code Covenants.

1734. Usual Common Law Covenants required by such contracts, when.

1735. Form of such covenants.

Agreement  
for sale.

SEC. 1726. An agreement for sale is either—

1. An agreement to sell.

2. An agreement to buy; or,

3. A mutual agreement to sell and buy.

N. Y. C. C., Sec. 857.

Agreement  
to sell.

SEC. 1727. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

N. Y. C. C., Sec. 858.

Agreement  
to buy.

SEC. 1728. An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing.

N. Y. C. C., Sec. 859.



**Sec. 1729** An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.

Agreement to sell and buy.

N. Y. C. C., Sec. 860.

**Sec. 1730.** Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not.

What may be the subject of the contract.

N. Y. C. C., Sec. 861.

**Sec. 1731.** An agreement to sell real property is an executory contract, which binds the seller to execute a grant in the form and manner prescribed by the chapter on *Transfers of Real Property* and by this article.

Agreement to sell real property.

N. Y. C. C., Sec. 862.

**Sec. 1732.** The authority of an agent to execute an executory real instrument must be in writing, subscribed by the principal, or by an agent of the principal, duly authorized by writing.

Authority of agent to execute executory contract must be in writing.

[New section.]

**Sec. 1733** An executory contract to grant real property obligates the seller to convey by grant—

Form of grant required by such contract.

1. If no covenants are required by the terms of the executory contract, then by grant in form prescribed by Sec. 1102.

2. If Special Code Covenants are required by the terms of the contract, then by grant in form prescribed by Sec. 1107.

Code Covenants.

3. If General Code Covenants are required by the terms of the contract, then by grant in form prescribed by Sec. 1108.

[New section.]

**Norm.**—The following sections, taken from the New York Civil Code, show how this matter of covenants is disposed of there. They are *entirely consistent* with the Code Covenants. Both can be retained in the Code and the conveyancer can take his choice; or either can be omitted.

**Sec. 1734.** An agreement on the part of a seller of real property to give the usual Common Law Covenants, binds him to insert in the grant covenants of "seizin," "quiet enjoyment," "further assurance," "general warranty," and "against encumbrances."

Usual Common Law Covenants required by such contracts, when

N. Y. C. C., Sec. 863.

NOTE.—The words “common law” are interpolated, in contradistinction to “code” covenants.

It is observed that the covenant of “right to convey” is omitted by the New York revisers. Why?

Form of such covenants.

SEC. 1735. The covenants mentioned in the last section must be as follows: “The party of the first part covenants with the party of the second part, that the former is now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances; that the party of the first part, and all persons acquiring any interest in the same through or for him, will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same.”

This provision is new. Its object is the same as that of Sec. 485, namely, to reduce the length of conveyances, and to provide a plain and sufficient form, as is done by the English statute (8 and 9 Vic., Chap. 119). The Commissioners believe that the form here given is sufficient to cover all the intricately worded stipulations usually given in such cases.

N. Y. C. C., Sec. 854.

### ARTICLE III.

#### FORM OF THE CONTRACT.

SECTION 1739. Contract for sale of personal property.

1740. Contract to manufacture.

1741. Contract for sale of real property.

Contract for sale of personal property.

SEC. 1739. No sale of personal property, or agreement to buy or sell it, for a price of two hundred dollars or more, is valid, unless—

1. A memorandum of the contract, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged; or,

2. The buyer accepts and receives part of the thing sold, or, when it consists of a thing in action, part of the evidences thereof; or,

3. The buyer, at the time of sale, pays a part of the price.

“Fraudulent Conveyances and Contracts,” Sec. 13; N. Y. C. C., Sec. 865.

**SEC. 1740.** An agreement to manufacture a thing, from materials furnished by the manufacturer or by another person, is not within the provisions of the last section.

Contract to  
manufacture

N. Y. C. C., Sec. 866.

**SEC. 1741.** No agreement for the sale of real property, or of any estate therein, is valid, unless a memorandum thereof, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged, or unless the contract has been partially performed by the party seeking to enforce it, and such part performance has been accepted by the other.

Contract for  
sale of real  
property.

These particulars are specifically mentioned, in order to avoid the possibility of an interpretation requiring the consideration to be stated.

2 R. S., 135, Sec. 8; except that "the party to be charged" is substituted for "the vendor," so as to establish a rule uniform with that concerning sales of personal property.

2 R. S., 135, Sec. 9, retains the equitable doctrines of part performance. This provision is doubtless rather broader than the rules of equity would sustain, as it has always been required that, to take the case out of the statute, the party seeking to enforce an oral contract must show that he cannot be replaced in his former position (*Malins vs. Brown*, 4 N. Y., 403; *Bennett vs. Abrams*, 41 Barb., 619; *Williston vs. Williston*, id., 635; *Lowry vs. Tew*, 3 Barb. Ch., 407; *Rhodes vs. Rhodes*, 3 Sandf. Ch., 279; *Wolfe vs. Frost*, 4 id., 72; *German vs. Machin*, 6 Paige, 238; *Frame vs. Dawson*, 14 Ves., 386.)

But it is to be remembered that the equitable doctrine of part performance was always in contradiction of the letter of the statute, and that the Courts might therefore well hesitate to go so far as their sense of abstract justice would have dictated. In reducing their doctrines to the form of a statute, it seems only proper to adopt the principle which lies at the foundation of those decisions, without the restrictions which were imposed from a regard for the adverse provision of the statute of frauds.

This provision is inserted in this place, instead of being left to the chapter on *Specific Performance*, because it is thought that the fusion of law and equity makes this the proper course.

N. Y. C. C., Sec. 867.

NOTE.—See Secs. 1091, 1092 and 1732, of this Code.

## CHAPTER II.

### RIGHTS AND OBLIGATIONS OF THE SELLER.

#### ARTICLE I. RIGHTS AND DUTIES BEFORE DELIVERY.

##### II. DELIVERY.

##### III. WARRANTY.

## ARTICLE I.

## RIGHTS AND DUTIES BEFORE DELIVERY.

SECTION 1748. When seller must act as depositary.

1749. When seller may resell.

When seller  
must act as  
depositary.

SEC. 1748. After personal property has been sold, and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

N. Y. C. C., Sec. 869.

When seller  
may resell.

SEC. 1749. If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller, after payment is due, the seller may rescind the sale, or may enforce his lien for the price in the manner prescribed by the Title on *Liens*.

N. Y. C. C., Sec. 870.

## ARTICLE II.

## DELIVERY.

SECTION 1753. Delivery on demand.

1754. Delivery, where made.

1755. Expense of transportation.

1756. Notice of election as to delivery.

1757. Buyer's directions as to manner of sending thing sold.

1758. Delivery to be within reasonable hours.

1759. Sale of personal property, when void.

Delivery on  
demand.

SEC. 1753. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon.

N. Y. C. C., Sec. 871.

Delivery,  
where made.

SEC. 1754. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or, if it is not then in existence, it is deliverable at the place where it is produced.

N. Y. C. C., Sec. 872.

Expense of  
transporta-  
tion.

SEC. 1755. One who sells personal property must bring it to his own door, or other convenient place, for its

acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

N. Y. C. C., Sec. 873.

**SEC. 1756.** When either party to a contract of sale has an option as to the time, place or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

Notice of election as to delivery.

N. Y. C. C., Sec. 874.

**SEC. 1757.** If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or if, in the absence of special directions, he uses ordinary care in forwarding the thing, it is at the risk of the buyer.

Buyer's directions as to manner of sending thing sold.

N. Y. C. C., Sec. 875.

**SEC. 1758.** The delivery of a thing sold can be offered or demanded only within reasonable hours of the day.

Delivery to be within reasonable hours.

N. Y. C. C., Sec. 876.

**SEC. 1759.** A sale of personal property in the possession or under the control of the seller must be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, or such sale is void as against the creditors of the seller, or subsequent purchaser in good faith and for valuable consideration.

Sale of personal property, when void.

[New section.] **NOTE.**—Based on "Fraudulent Conveyances," Sec. 15, "and for valuable consideration," added to harmonize in effect of non-recording of real property.

### ARTICLE III.

#### WARRANTY.

**SECTION 1763.** Warranty, what.

1764. No implied warranty in mere contract of sale.

1765. Warranty of title to personal property.

1766. Warranty on sale by sample.

1767. When seller knows that buyer relies on his statements, etc.

1768. Merchandise not in existence.

1769. Manufacturer's warranty against latent defects.

1770. Thing bought for particular purpose.

1771. When thing cannot be examined by buyer.

1772. Trade marks.

## SECTION 1773. Other marks.

1774. Warranty on sale of written instrument.

1775. Warranty of provisions for domestic use.

1776. Warranty on sale of good will.

1777. Warranty upon judicial sale.

1778. Effect of general warranty.

Warranty,  
what.

SEC. 1763. A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present or future.

N. Y. C. C., Sec. 877.

No implied  
warranty in  
mere con-  
tract of sale.

SEC. 1764. Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.

N. Y. C. C., Sec. 878.

Warranty  
of title to  
personal  
property.

SEC. 1765. One who sells or agrees to sell personal property, as his own, [whether in or out of possession thereof] thereby warrants that he has a good and unencumbered title thereto.

*Defreeze vs. Trumper*, 1 Johns., 274; *Reid vs. Barber*, 3 Cow., 272; and see *Hoe vs. Sanborn*, 21 N. Y., 555. Whether this warranty is now implied, where the property is not in possession of the vendor, is in dispute. It is held that it is not, in *M'Coy vs. Archer*, 3 Barb., 323; *Huntington vs. Hall*, 36 Me., 501; that it is, in *Smith vs. Fairbanks*, 7 Foster, 521; see *Strong vs. Barnes*, 11 Vt., 221. It certainly is implied, when the property is in his possession (*Burt vs. Dewey*, 31 Barb., 540.)

N. Y. C. C., Sec. 879.

NOTE.—The words in brackets are new—inserted to harmonize with “Transfers of Real Property.” See Sec. 1047. Either this, or make clear the other proposition by substituting for the words in brackets, the following, “when in possession thereof.”

Warranty  
on sale by  
sample.

SEC. 1766. One who sells or agrees to sell, goods by sample, thereby warrants the bulk to be equal to the sample.

N. Y. C. C., Sec. 880.

When seller  
knows that  
buyer relies  
on his state-  
ment, etc.

SEC. 1767. One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

It is utterly impossible to reconcile the cases on this subject. This rule is perhaps as near their result as any that could be stated in as few words (see *Hoe vs. Sanborn*, 21 N. Y., 552; *Brown vs. Montgomery*, 20 id., 487; 2 Kent Com., 480).

It will be observed that it is only facts *concerning the thing* that are required to be disclosed. This restricts the range of the section to matters which, in morals, ought perhaps to be disclosed in even a broader class of cases.

N. Y. C. C., Sec. 881.

SEC. 1768. One who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care.

Merchandise  
not in exist-  
ence.

This principle, though not directly adjudicated, is clearly at the foundation of the decisions in regard to sales of goods to be manufactured by the seller (see Sec. 883), and is a necessary corollary of the rule which implies a warranty of goods which the buyer has had no opportunity to inspect (see Sec. 885). *Hamilton vs. Ganyard*, 34 Barb., 204, supports the rule here stated.

The absolute warranty extends only to the place of production. The inevitable injuries of transportation must be borne by the buyer (*Bull vs. Robison*, 10 Exch., 342). But of course this is to be construed in view of the intention of the parties. If an article is purchasable in New York, in perfect condition, and the same kind of thing is imported from London, but is always injured by the voyage, the seller cannot compel the buyer to accept the latter article, unless the parties contemplated London as the place of production.

N. Y. C. C., Sec. 882.

SEC. 1769. One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

Manufactu-  
rer's war-  
ranty against  
latent de-  
fects.

N. Y. C. C., Sec. 883.

SEC. 1770. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.

Thing bou't  
for particu-  
lar purpose.

N. Y. C. C., Sec. 884.

SEC. 1771. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable.

When thing  
cannot be  
examined  
by buyer.

N. Y. C. C., Sec. 885.

**Trade marks**

**SEC. 1772.** One who sells or agrees to sell any article to which there is affixed or attached a trade mark, thereby warrants that mark to be genuine, and lawfully used.

From Stat. 25 and 26 Vict., Chap. 88, Sec. 19. This statute enacts that this warranty can be dispensed with only by a written refusal to warrant.

N. Y. C. C., Sec. 886.

**Other marks**

**SEC. 1773.** One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured or prepared, thereby warrants the truth thereof.

N. Y. C. C., Sec. 887.

**Warranty on sale of written instrument.**

**SEC. 1774.** One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

Gurney vs. Womersley, 4 El. & Bl., 133; Cabot Bank vs. Morton, 4 Gray, 156; Herrick vs. Whitney, 15 Johns., 240; Gompertz vs. Bartlett, 2 El. & Bl., 849; Canal Bank vs. Bank of Albany, 1 Hill, 287.

Delaware Bank vs. Jarvis, 20 N. Y., 226; Furniss vs. Ferguson, 15 id., 437; Young vs. Cole, 2 Bing. N. C., 724; 4 Scott, 489.

In some cases the value of an obligation may be entirely independent of the solvency of the party bound thereby, as for example, where he is bound to execute a power.

Brown vs. Montgomery, 20 N. Y., 287. He does not warrant the solvency of the parties (Elwell vs. Chamberlain, 4 Bosw., 320).

N. Y. C. C., Sec. 888.

**Warranty of provisions for domestic use.**

**SEC. 1775.** One who makes a business of selling provisions for domestic use warrants, by a sale thereof, to one who buys for actual consumption, and not for the purpose of sale, that they are sound and wholesome.

Burnby vs. Bollett, 16 M. & W., 644.

Moses vs. Mead, 1 Denio, 379; 5 id., 617; Goldrich vs. Ryan, 3 E. D. Smith, 324; Hyland vs. Sherman, 2 id., 234.

Van Bracklin vs. Fonda, 12 Johns., 463. In a recent English decision (Emmerton vs. Mathews, 7 H. & N., 536), it was held that no such warranty is implied; that the seller's liability rests solely upon the ground of fraud; and, therefore, that he is not liable unless he knows that the provisions are bad.

N. Y. C. C., Sec. 889.



**Sec. 1776.** One who sells the good will of a business, thereby warrants that he will not endeavor to draw off any of the customers.

N. Y. C. C., Sec. 890.

**Sec. 1777.** Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.

N. Y. C. C., Sec. 891.

**Sec. 1778.** A general warranty does not extend to defects inconsistent therewith, of which the buyer was then aware, or which were then easily discernable by him, without the exercise of peculiar skill; but it extends to all other defects.

N. Y. C. C., Sec. 892.

### CHAPTER III.

#### RIGHTS AND OBLIGATIONS OF THE BUYER.

**SECTION 1784.** Price, when to be paid.

1785. Right to inspect goods.

1786. Rights in case of breach of warranty.

**Sec. 1784.** A buyer must pay the price of the thing sold, on its delivery; and must take it away within a reasonable time after the seller offers to deliver it.

N. Y. C. C., Sec. 893.

**Sec. 1785.** On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time before accepting it; and may rescind the contract if the seller refuses to permit him to do so.

N. Y. C. C., Sec. 894.

**Sec. 1786.** The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition.

N. Y. C. C., Sec. 895.

**NOTE.**—See Sec. 3307 of this Code, on "Rescission of Covenant of Ownership."

## CHAPTER IV.

## SALE BY AUCTION.

## SECTION 1792. Sale by auction, what.

1793. Sale, when complete.

1794. Withdrawal of bid.

1795. Sale under written conditions.

1796. Rights of buyer upon sale without reserve.

1797. By-bidding.

1798. Auctioneer's memorandum of sale.

Sale by auc-  
tion, what.

SEC. 1792. A sale by auction is a sale by public outcry to the highest bidder on the spot.

N. Y. C. C., Sec. 896.

Sale, when  
complete.

SEC. 1793. A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

N. Y. C. C., Sec. 897.

Withdrawal  
of bid.

SEC. 1794. Until the announcement mentioned in the last section has been made, any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

N. Y. C. C., Sec. 898.

Sale under  
written con-  
ditions.

SEC. 1795. When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.

N. Y. C. C., Sec. 899.

Rights of  
buyer upon  
sale without  
reserve.

SEC. 1796. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void.

N. Y. C. C., Sec. 900.

By-bidding.

SEC. 1797. The employment by a seller, of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his

bid, is a fraud upon the buyer, which entitles him to rescind his purchase.

N. Y. C. C., Sec. 901.

**SEC. 1798.** When property is sold by auction, the auctioneer, or his partner or clerk, may enter in a sale book, at the time of the sale, a memorandum specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer. A memorandum thus made binds both the parties in the same manner as if made by themselves [and is a memorandum of the contract, within the meaning of Sec. 1739].

Auctioneer's  
memoran-  
dum of sale.

N. Y. C. C., Sec. 902—modified in form, but not in effect;  
“Fraudulent Conveyances and Contracts,” Sec. 14.

**NOTE.**—The section from the New York Civil Code, with the new in brackets, contains the substance of Sec. 14, cited.

## TITLE II.

### EXCHANGE.

**SECTION 1804.** Exchange, what.

1805. Form of contract.

1806. Parties have rights and obligations of sellers and buyers.

1807. Warranty of money.

**SEC. 1804.** Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.

Exchange,  
what.

N. Y. C. C., Sec. 903.

**SEC. 1805.** The provisions of Sec. 1739 apply to all exchanges in which the value of the thing to be given by either party is two hundred dollars or more.

Form of  
contract.

N. Y. C. C., Sec. 904.

**NOTE.**—“Two hundred” substituted for “fifty,” corresponding with Sec. 1793.

**SEC. 1806.** The provisions of the Title on *Sale* apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

Parties have  
rights and  
obligations  
of sellers  
and buyers.

N. Y. C. C., Sec. 905.

Warranty  
of money.

SEC. 1807. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

N. Y. C. C., Sec. 906.

## TITLE III.

### DEPOSIT.

#### CHAPTER I. DEPOSIT IN GENERAL.

#### II. DEPOSIT FOR KEEPING.

#### III. DEPOSIT FOR EXCHANGE.

### CHAPTER I.

#### DEPOSIT IN GENERAL.

#### ARTICLE I. NATURE AND CREATION OF DEPOSIT.

#### II. OBLIGATIONS OF THE DEPOSITARY.

#### ARTICLE I.

#### NATURE AND CREATION OF DEPOSIT.

##### SECTION 1813. Deposit, kinds of.

1814. Voluntary deposit, how made.

1815. Involuntary deposit, how made.

1816. Same.

1817. Deposit for keeping, what.

1818. Deposit for exchange, what.

Deposit,  
kinds of.

SEC. 1813. A deposit may be voluntary or involuntary; and for safe keeping or for exchange.

N. Y. C. C., Sec. 907.

Voluntary  
deposit, how  
made.

SEC. 1814. A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving, the depositary.

N. Y. C. C., Sec. 908.

Involuntary  
deposit, how  
made.

SEC. 1815. An involuntary deposit is made—

1. By the accidental leaving or placing of personal

property in the possession of any person, without negligence on the part of its owner; or,

2. In cases of fire, shipwreck, inundation, insurrection, riot or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

N. Y. C. C., Sec. 909.

SEC. 1816. The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so. Same.

N. Y. C. C., Sec. 910.

SEC. 1817. A deposit for keeping is one in which the depositary is bound to return the identical thing deposited. Deposit for keeping, what.

N. Y. C. C., Sec. 911.

SEC. 1818. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited. Deposit for exchange, what.

N. Y. C. C., Sec. 912.

## ARTICLE II.

### OBLIGATIONS OF THE DEPOSITARY.

SECTION 1822. Depositary must deliver on demand.

1823. No obligation to deliver without demand.

1824. Place of delivery.

1825. Notice to owner of adverse claim.

1826. Notice to owner of thing wrongfully detained.

1827. Delivery of thing owned jointly, etc.

SEC. 1822. A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by Sec. 1825. Depositary must deliver on demand.

N. Y. C. C., Sec. 913.

SEC. 1823. A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time. No obligation to deliver without demand.

N. Y. C. C., Sec. 914.

Place of  
delivery.

SEC. 1824. A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him.

N. Y. C. C., Sec. 915.

Notice to  
owner of ad-  
verse claim.

SEC. 1825. A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him.

N. Y. C. C., Sec. 916.

Notice to  
owner of  
thing wrong-  
fully de-  
tained.

SEC. 1826. A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice.

N. Y. C. C., Sec. 917.

Delivery of  
thing owned  
jointly, etc.

SEC. 1827. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing.

This provision is new, but is intended to obviate a difficulty which may sometimes arise.

N. Y. C. C., Sec. 918.

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## CHAPTER II.

### DEPOSIT FOR KEEPING.

#### ARTICLE I. GENERAL PROVISIONS.

##### II. GRATUITOUS DEPOSIT.

##### III. STORAGE.

##### IV. INNKEEPERS.

##### V. FINDING.

## ARTICLE I.

## GENERAL PROVISIONS.

**SECTION 1833.** Depositor must indemnify depositary.

1834. Obligation of depositary of animals.

1835. Obligations as to use of thing deposited.

1836. Liability for damage arising from wrongful use.

1837. Sale of thing in danger of perishing.

1838. Injury to, or loss of thing deposited.

1839. Service rendered by depositary.

1840. Extent of his liability for negligence.

**SEC. 1833.** A depositor must indemnify the depositary—

Depositor  
must indem-  
nify depos-  
itary.

1. For all damage caused to him by the defects or vices of the thing deposited; and,

2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking.

N. Y. C. C., Sec. 919.

**SEC. 1834.** A depositary of living animals must provide them with suitable food and shelter, and treat them kindly.

Obligation  
of depositary  
of animals.

N. Y. C. C., Sec. 920.

**SEC. 1835.** A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity.

Obligations  
as to use of  
thing depos-  
ited.

N. Y. C. C., Sec. 921.

**SEC. 1836.** A depositary is liable for any damage happening to the thing deposited, during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used.

Liability for  
damage aris-  
ing from  
wrongful use

N. Y. C. C., Sec. 922.

**SEC. 1837.** If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor.

Sale of thing  
in danger of  
perishing.

N. Y. C. C., Sec. 923.

Injury to, or  
loss of thing  
deposited.

Sec. 1838. If a thing is lost or deposit, and the depositary refuses to tor of the circumstances under which occurred, so far as he has information or wilfully misrepresents the circum depositary is presumed to have wilfull ligence, permitted the loss or injury to

N. Y. C. C., Sec. 924.

Service ren-  
dered by  
depositary.

Sec. 1839. So far as any service depositary, or required from him, his ties are prescribed by the Title on *Em*

N. Y. C. C., Sec. 925.

Extent of his  
liability for  
negligence.

Sec. 1840. The liability of a deposi is limited to the amount which he reason to suppose, the thing deposited

N. Y. C. C., Sec. 926.

## ARTICLE II.

### GRATUITOUS DEPOSIT.

Section 1844. Gratuitous deposit, what.

1845. Nature of involuntary deposit.

1846. Degree of care required of gratuit

1847. His duties cease, when.

Gratuitous  
deposit, what

Sec 1844. Gratuitous deposit is a the depositary receives no consideration possession of the thing deposited.

N. Y. C. C., Sec. 927.

Nature of  
involuntary  
deposit.

Sec. 1845. An involuntary deposit depositary being entitled to no reward

N. Y. C. C., Sec. 928.

Degree of  
care required  
of gratuitous  
depositary.

Sec. 1846. A gratuitous depositary slight care for the preservation of the

N. Y. C. C., Sec. 929.

His duties  
cease, when.

Sec. 1847. The duties of a gratuitous  
1. Upon his restoring the thing dep  
or,

2. Upon his giving reasonable noti  
remove it, and the owner failing to do



## CODE.

y depositary, under Sub  
notice until the emerge  
t is past.

10.

### DE III.

102.

ed of depositary for hire.  
for fraction of a week, etc.  
it.

gratuitous is called stor  
called a depositary for h  
31.

for hire must use at l  
ation of the thing deposi  
32.

of a different agreemen  
s entitled to one week's  
er of living animals du.  
to half a month's hire

the storage of any other property during any fractio  
a half month.

N. Y. C. C., Sec. 933.

Sec. 1854. In the absence of an agreement as to  
length of time during which a deposit is to continu  
may be terminated by the depositor at any time, and  
the depositary upon reasonable notice.

N. Y. C. C., Sec. 934.

Sec. 1855. Notwithstanding an agreement respec  
e length of time during which a deposit is to conti  
may be terminated by the depositor on paying all  
ould become due to the depositary in case of the dep  
continuing.

N. Y. C. C., Sec. 935.

## ARTICLE IV.

## INNKEEPERS.

SECTION 1859. Innkeeper's liability.

1860. How exempted from liability.

Innkeeper's  
liability.

SEC. 1859. An innkeeper is liable for all losses of, or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

N. Y. C. C., Sec. 936.

How ex-  
empted from  
liability.

SEC. 1860. If an innkeeper keeps a fireproof safe, and gives notice to a guest, either personally, or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of, or injury to, such articles, if not deposited with him, and not required by the guest for present use.

N. Y. C. C., Sec. 937 ; Cal. C. C., Sec. 3024, "Innkeeper's Lien."

## ARTICLE V.

## FINDING.

SECTION 1864. Obligation of finder.

1865. Finder to notify owner.

1866. Claimant to prove ownership.

1867. Reward, etc., to finder.

1868. Finder may put thing found on storage.

1869. When finder may sell the thing found.

1870. How sale is to be made.

1871. Surrender of thing to the finder.

1872. Thing abandoned.

Obligation  
of finder.

SEC. 1864. One who finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire.

This section, and some of the ensuing ones, differ materially from the common law, under which the finder is a gratuitous depositary. Mr. Justice Story considered the law in this respect to be unsatisfactory, and the Commis-

ve altered it, giving the finder a reward, and him to a corresponding accountability. This is to both parties.

. C., Sec. 938.

finder of a thing knows or suspects he must, with reasonable diligence, find the owner; and if he fails to do so, he is liable to the owner, and has no claim to compensation from him for the recovery of the thing, or for his trouble or expenses.

Finder to notify owner.

. C., Sec. 939.

finder of a thing may, in good faith, require reasonable proof of ownership before claiming it.

Claimant to prove ownership.

. C., Sec. 940.

finder of a thing is entitled to compensation for the expenses necessarily incurred by him in its recovery, and for any other service necessarily performed by him in its recovery, and to a reasonable reward for its recovery.

Reward, etc., to finder.

. C., Sec. 941.

finder of a thing may exonerate himself from liability at any time, by placing it on storage with a person of good character, at a rea-

Finder may put thing found on storage.

. C., Sec. 942.

finder of a thing may sell it, if it is a thing which is only the subject of sale, when the finder has exercised reasonable diligence, he found, or, upon demand to pay the lawful value of the thing, in the following cases:  
1. When the thing is in danger of perishing, or of loss of its value; or,  
2. When the charges of the finder amount to more than the value of the thing.

When finder may sell the thing found.

. C., Sec. 943.

under the provisions of the last section, the sale shall be made in the same manner as the sale of a thing found.

How sale is to be made.

rules governing such a sale, see the chapter on sales.

. C., Sec. 944.

Surrender  
of thing to  
the finder.

SEC. 1871. The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

This provision cannot be supported by the citation of any positive authority, but seems proper, in order to prevent owners from being made responsible for excessive expenses.

N. Y. C. C., Sec. 945.

Thing aban-  
doned

SEC. 1872. The provisions of this article have no application to things which have been intentionally abandoned by their owners.

N. Y. C. C., Sec. 946.

## CHAPTER III.

### DEPOSIT FOR EXCHANGE.

SECTION 1878. Relations of the parties.

Relations of  
the parties.

SEC. 1878. A deposit for exchange transfers to the depositary the title to the thing deposited, and creates between him and the depositor the relation of debtor and creditor merely.

N. Y. C. C., Sec. 947.

## TITLE IV.

### LOAN.

#### CHAPTER I. LOAN FOR USE.

#### II. LOAN FOR EXCHANGE.

#### III. LOAN OF MONEY.

### CHAPTER I.

#### LOAN FOR USE.

SECTION 1884. Loan, what.

1885. Title to property lent.

1886. Care required of borrower.

1887. Same.

1888. Degree of skill.

then to repair injuries.

lent.

forbidden.

then to bear expenses.

for defects.

require return of thing lent.

able without demand.

ura.

for use is a contract by which one Loan, what.  
 temporary possession and use of  
 the latter agrees to return the same  
 re time, without reward for its use.  
 C., Sec. 948.

for use does not transfer the title to Title to prop-  
erty lent.  
 increase during the period of the  
 nder.  
 C., Sec. 949.

ower for use must use great care for Care re-  
quired of  
borrower.  
 afety and in good condition of the  
 C., Sec. 950.

to borrows a living animal for use, Same.  
 great kindness, and provide every-  
 uitable for it.  
 C., Sec. 951.

ower for use is bound to have and to Degree of  
skill.  
 the care of the thing lent as he  
 alieve him to possess.  
 C., Sec. 952.

ower for use must repair all deterio- Borrower,  
when to re-  
pair injuries.  
 the thing lent, which are occasioned  
 wever slight.  
 C., Sec. 953.

orrower of a thing for use may use it Use of thing  
lent.  
 ly as the lender might reasonably  
 of lending.  
 C., Sec. 954.

orrower of a thing for use must not part Relending,  
forbidden.  
 on, without the consent of the lender.  
 C., Sec. 955.

Borrower,  
when to bear  
expenses.

SEC. 1892. The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender, who may, however, exonerate himself by surrendering the thing to the borrower.

N. Y. C. C., Sec. 956.

Lender lia-  
ble for de-  
fects.

SEC. 1893. The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it, which he knew at the time of lending, and concealed from the borrower.

N. Y. C. C., Sec. 957.

Lender may  
require  
return of  
thing lent.

SEC. 1894. The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if, on the faith of such an agreement, the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty.

N. Y. C. C., Sec. 958.

When re-  
turnable  
without de-  
mand.

SEC. 1895. If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand, as soon as the time has expired, or the purpose has been accomplished. In other cases it need not be returned until demanded.

N. Y. C. C., Sec. 959.

Place of  
return.

SEC. 1896. The borrower of a thing for use must return it to the lender, at the place contemplated by the parties at the time of lending; or if no particular place was so contemplated by them, then at the place where it was at that time.

N. Y. C. C., Sec. 960.

## CHAPTER II.

## LOAN FOR EXCHANGE.

exchange, what.

property lent.

cannot be modified by lender.

provisions applicable.

for exchange is a contract by which property to another, and the latter to the lender a similar thing at a future time for its use.

Loan for  
exchange,  
what.

C., Sec. 961.

which the borrower is allowed by the lender to use, as a loan for use, or for exchange, at all the provisions of this chapter.

Same.

C., Sec. 962.

loan for exchange the title to the property is transferred to the borrower, and he must return it and is entitled to all its increase.

Title to  
property  
lent.

C., Sec. 963.

loan for exchange cannot require the lender to assume obligations at a time, or in a manner, which was originally agreed upon.

Contract  
cannot be  
modified by  
lender.

flows from the nature of the contract. It is, in fact, an executory exchange.

C., Sec. 964.

Sections 1893, 1895 and 1896, apply to a loan for exchange.

Certain sec-  
tions appli-  
cable.

## CHAPTER III.

## LOAN OF MONEY.

Originally, no interest was allowed upon a loan.

But with the progress of business, it became necessary to allow interest, and the transaction thus entered into, although it is a hiring, is universally known as a loan. This word having obtained so long, it would be idle to change it.

## CIVIL CODE.

### Section 1912. Loan of money.

1913. Loan to be repaid in current money.

1914. Loan may be for reward.

1915. Interest, what.

1916. Annual rate.

1917. Legal interest.

1918. Same.

1919. Interest becomes part of principal.

1920. Interest on judgment.

Sec. 1912. A loan of money is a contract by which one delivers a sum of money to another who agrees to return at a future time a sum of money which he borrowed. A loan for mere use is governed by the chapter on *Loan for Use*.

N. Y. C. C., Sec. 966.

Sec. 1913. A borrower of money must repay in such money as is current at the time the loan becomes due, whether such money is more or less than the actual money lent.

N. Y. C. C., Sec. 967.

Sec. 1914. A loan of money may be made for reward, but is presumed to be made for use.

N. Y. C. C., Sec. 968.

Sec. 1915. Reward for the loan, for the use of money, or its equivalent, is called interest.

N. Y. C. C., Sec. 969.

Sec. 1916. When a rate of interest is specified by law or contract, without specifying the time at which such rate is to be calculated, it is an annual rate.

N. Y. C. C., Sec. 970.

Sec. 1917. Under an obligation to pay interest, if being specified, interest is payable at the rate of one per cent. per annum, and in like proportion for any shorter time; but in the computation of interest, more than a year, three hundred and sixty days constitute a year.

N. Y. C. C., Sec. 971; Stats.  
189, Sec. 1.

Sec. 1918. Parties may agree in writing to pay interest at any rate of interest, and it shall be valid.



## IL CODE.

he agreement, until the entry of

53, Sec. 2 ; 1870, 699, Sec. 1.

e may, in any contract in writ-  
secured to be paid, agree that if  
is not punctually paid, it shall  
incipal, and thereafter bear the  
he principal debt.

1, Sec. 3.

ent in any Court of this State  
rate to exceed seven per cent.  
ist not be compounded in any  
gment.

## T L E V.

### HIRING.

#### GENERAL.

#### REAL PROPERTY.

#### PERSONAL PROPERTY.

## AFTER I.

### I IN GENERAL.

§.

to., on part of hirer.

ries, étc.

particular purpose.

terminate the hiring.

terminate the hiring.

minates.

d by death, etc., of party.

of hire.

a contract by which one gives to  
possession and use of property  
eward, and the latter agrees to  
ormer at a future time.

Sec. 979.

Products of  
thing.

**SEC. 1926.** The products of a thing hired, during the hiring, belong to the hirer.

N. Y. C. C., Sec. 980.

Quiet  
possession.

**SEC. 1927.** An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

N. Y. C. C., Sec. 981.

Degree of  
care, etc., on  
part of hirer.

**SEC. 1928.** The hirer of a thing must use ordinary care for its preservation in safety and in good condition.

N. Y. C. C., Sec. 982.

Must repair  
injuries, etc.

**SEC. 1929.** The hirer of a thing must repair all deteriorations or injuries thereto, occasioned by his ordinary negligence.

N. Y. C. C., Sec. 983.

Thing let for  
a particular  
purpose.

**SEC. 1930.** When a thing is let for a particular purpose, the hirer must not use it for any other purpose; and if he does, the letter may hold him responsible for its safety during such use, in all events, or may treat the contract as thereby rescinded.

N. Y. C. C., Sec. 984.

When letter  
may termi-  
nate the  
hiring.

**SEC. 1931.** The letter of a thing may terminate the hiring, and reclaim the thing, before the end of the term agreed upon—

1. When the hirer uses, or permits a use of the thing hired, in a manner contrary to the agreement of the parties; or,

2. When the hirer does not, within a reasonable time after request, make such repairs as he is bound to make.

N. Y. C. C., Sec. 985.

When hirer  
may termi-  
nate the  
hiring.

**SEC. 1932.** The hirer of a thing may terminate the hiring before the end of the term agreed upon—

1. When the letter does not, within a reasonable time after request, fulfil his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing; or,

2. When the greater part of the thing hired, or that part which was, and which the letter had, at the time of

believe was, the material inducement into the contract, perishes than the ordinary negligence of the

„ Sec. 986.

ing of a thing terminates—

When hiring terminates.

1. At the end of the term agreed upon.
2. By the mutual consent of the parties.
3. By the hirer acquiring a title to the thing hired, superior to that of the letter; or,
4. By the destruction of the thing hired.

N. Y. C. C., Sec. 987.

Sec. 1934. If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby.

When terminated by death, etc., of party.

N. Y. C. C., Sec. 988.

Sec. 1935. When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.

Apportionment of hire.

N. Y. C. C., Sec. 989.

## CHAPTER II.

### HIRING OF REAL PROPERTY.

1941. Lessor to make dwelling house fit for its purpose.
1942. When lessee may make repairs, etc.
1943. Term of hiring when no limit is fixed.
1944. Hiring of lodgings for indefinite term.
1945. Renewal of lease by lessee's continued possession.
1946. Notice to quit.
1947. Rent, when payable.
1948. Tenant must deliver notice served on him.
1949. Letting parts of rooms forbidden.

1941. The lessor of a building intended for the habitation of human beings must put it into a condition for that purpose, and must repair all subsequent dilapidations thereof, except such as are mentioned in Sec.

Lessor to make dwelling house fit for its purpose.

This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year 1861, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication, were it not that the community at large revolt at every application of the rule. A partial reform has been effected by the Legislature in suspending the rent of houses destroyed or injured, in certain cases (Laws 1860, Chap. 345), and it ought to be carried still further.

N. Y. C. C., Sec. 990.

When lessee  
may make  
repairs, etc.

SEC. 1942. If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor.

N. Y. C. C., Sec. 991.

Term of  
hiring when  
no limit is  
fixed.

SEC. 1943. A hiring of real property, other than lodgings [and dwelling houses], in places where there is no usage on the subject, is presumed to be for one year from its commencement [unless otherwise expressed in the hiring].

N. Y. C. C., Sec. 992.

Hiring of  
lodgings for  
indefinite  
term.

SEC. 1944. A hiring of lodgings [or a dwelling house] for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly.

N. Y. C. C., Sec. 993.

Renewal of  
lease by  
lessee's  
continued  
possession.

SEC. 1945. If a lessee of real property remains in possession thereof, after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year.

N. Y. C. C., Sec. 994.

Notice to  
quit.

SEC. 1946. A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his

ate the same, at least as long before  
reof as the term of the hiring itself,  
month.

C. C., Sec. 995.

n there is no usage or contract to the  
e payable at the termination of the  
es not exceed one year. If the hold-  
week, month, quarter or year, rent is  
mination of the respective periods, as  
mes due.

Rent, when  
payable.

—Substitute for Sec. 996 of the New York Civil

y tenant who receives notice of any  
ver the real property occupied by him,  
thereof, must immediately inform his  
se.

Tenant must  
deliver no-  
tice served  
on him.

C. C., Sec. 997.

who hires part of a room for a dwell-  
ie whole of the room, notwithstanding  
the contrary; and if a landlord lets a  
for more than one family, the person  
its any part of it is entitled to the pos-  
le room for the term agreed upon, and  
e building, under the same landlord, is  
bligation to pay rent to him.

Letting  
parts of  
rooms for-  
bidden.

provision is intended to prevent one of the chief  
of tenement houses. Mere penalties, whether civil  
inal, are not likely to be enforced. But the loss of  
uld be a punishment that could be enforced by way  
see to an action.

C. C., Sec. 998.

## CHAPTER III.

### OF PERSONAL PROPERTY.

ons of letter of personal property.  
y expenses.  
dinary expenses.  
of thing hired.  
party, what.

Obligations  
of letter of  
personal  
property.

SEC. 1955. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer, and not the natural result of its use.

N. Y. C. C., Sec. 999.

Ordinary  
expenses.

SEC. 1956. A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

N. Y. C. C., Sec. 1000.

Extraordi-  
nary ex-  
penses.

SEC. 1957. If a letter fails to fulfil his obligations, as prescribed by Sec. 1956, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him.

N. Y. C. C., Sec. 1001.

Return of  
thing hired.

SEC. 1958. At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring, or, if no particular place was so contemplated by them, at the place which it was at that time.

N. Y. C. C., Sec. 1002.

Charter  
party, what.

SEC. 1959. The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer.

N. Y. C. C., Sec. 1003.

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## TITLE VI.

### SERVICE.

#### CHAPTER I. SERVICE WITH EMPLOYMENT.

#### II. PARTICULAR EMPLOYMENTS.

#### III. SERVICE WITHOUT EMPLOYMENT.

## CHAPTER I.

## SERVICE WITH EMPLOYMENT.

- ARTICLE I. DEFINITION OF EMPLOYMENT.  
 II. OBLIGATIONS OF THE EMPLOYER.  
 III. OBLIGATIONS OF THE EMPLOYÉ.  
 IV. TERMINATION OF EMPLOYMENT.

## ARTICLE I.

## DEFINITION OF EMPLOYMENT.

SECTION 1965. Employment, what.

SEC. 1965. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employé, to do something for the benefit of the employer, or of a third person.

Employment, what.

The scope of this chapter is not confined to servants, but includes factors, brokers, carriers, agents, and all similar classes of persons.

N. Y. C. C., Sec. 1004.

## ARTICLE II.

## OBLIGATIONS OF THE EMPLOYER.

SECTION 1969. When employer must indemnify employé.

1970. When not.

1971. Employer to indemnify for his own negligence.

SEC. 1969. An employer must indemnify his employé, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employé, at the time of obeying such directions, believed them to be unlawful.

When employer must indemnify employé.

N. Y. C. C., Sec. 1005.

SEC. 1970. An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risk of the business in which he is em-

When not.

ployed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.

N. Y. C. C., Sec. 1006.

Employer  
to indemnify  
for his own  
negligence.

SEC. 1971. An employer must in all cases indemnify his employé for losses caused by [the former's] want of ordinary care.

N. Y. C. C., Sec. 1007.

NORM.—“The former's,” in brackets, substituted for “his own.”

### ARTICLE III.

#### OBLIGATIONS OF THE EMPLOYÉ.

SECTION 1975. Duties of gratuitous employé.

1976. Same.

1977. Same.

1978. Duties of employé for reward.

1979. Duties of employé for his own benefit.

1980. Contracts for service limited to two years.

1981. Employé must obey employer.

1982. Employé to conform to usage.

1983. Degree of skill required.

1984. Must use what skill he has.

1985. What belongs to employer.

1986. Duty to account.

1987. Employé not bound to deliver without demand.

1988. Preference to be given to employers.

1989. Responsibility of employé for substitute.

1990. Responsibility for negligence.

1991. Surviving employé.

1992. Confidential employment.

Duties of  
gratuitous  
employé.

SEC. 1975. One who, without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

N. Y. C. C., Sec. 1008.

Same.

SEC. 1976. One who, by his own special request, induces another to intrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.



This distinction is recognized by the civil law, but it is not clear that it is admitted by the common law. There is good reason for it, since a volunteer of this kind might seriously mislead one who relied upon him, and who would otherwise have employed some one else for a compensation, and thus have been sure of the service he required.

N. Y. C. C., Sec. 1009.

**SEC. 1977.** A gratuitous employé, who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so. Same.

Code La., 2971. This provision is new to the common law; but is founded upon justice. By retaining the instrument, the attorney keeps in his hands a power which he may use to the detriment of his principal, and misleads the latter into the belief that he will use it for his benefit.

N. Y. C. C., Sec. 1010.

**SEC. 1978.** One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed. Duties of employé for reward.

N. Y. C. C., Sec. 1011.

**SEC. 1979.** One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter. Duties of employé for his own benefit.

N. Y. C. C., Sec. 1012.

**SEC. 1980.** A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on *Master and Servant*, cannot be enforced against the employé beyond the term of two years from the commencement of service under it, but if the employé voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation. Contracts for services limited to two years.

N. Y. C. C., Sec. 1013.

**SEC. 1981.** An employé must substantially comply with all the directions of his employer concerning the service on which he is engaged, even though contrary to the provisions of this Title, except where such obedience is impossible, or unlawful, or would impose new and unreasonable burdens upon the employé, or in case of an emergency which, according to the best information which the employé can with reasonable diligence obtain, Employé must obey employer.

the employer did not contemplate, in which he cannot, with reasonable diligence, be consulted, and in which non-compliance is judged by the employé, in good faith, and in the exercise of reasonable discretion, to be absolutely necessary for the protection of the employer's interests. In all such cases, the employé must conform as nearly to the directions of his employer as may be reasonably practicable, and most for the interest of the latter.

N. Y. C. C., Sec. 1014.

Employé to conform to usage.

SEC. 1982. An employé must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

Story on Agency, Sec. 199; Johnson vs. N. Y. Central R. R., 31 Barb., 196; see Horton vs. Morgan, 19 N. Y., 170.

N. Y. C. C., Sec. 1015.

Degree of skill required.

SEC. 1983. An employé is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

N. Y. C. C., Sec. 1016.

Must use what skill he has.

SEC. 1984. An employé is always bound to use such skill as he possesses.

Wilson vs. Brett, 11 M. & W., 113.

N. Y. C. C., Sec. 1017.

What belongs to employer.

SEC. 1985. Everything which an employé acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

Code La., 2074; see Tenant vs. Elliott, 1 Bos. & P., 3; Farmer vs. Russell, id., 296; Bonsfield vs. Wilson, 16 M. & W., 185; Edmondstone vs. Hartshorne, 19 N. Y., 9.

N. Y. C. C., Sec. 1018.

Duty to account.

SEC. 1986. An employé must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

Story on Agency, Sec. 203; Collyer vs. Dudley, Turn. & Russ., 421; by Duer, J., Heubach vs. Mollmann, 2 Duer, 227, 252; see Edmondstone vs. Hartshorne, 19 N. Y., 9.

N. Y. C. C., Sec. 1019.

**SEC. 1987.** An employé who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employé himself.

Employé not bound to deliver without demand.

N. Y. C. C., Sec. 1020.

**SEC. 1988.** An employé who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference. If intrusted with similar affairs by different employers, he must give them preference according to their relative urgency, or, other things being equal, according to the order in which they were committed to him.

Preference to be given to employers

There is no direct authority for these provisions, but they are required by sound principle.

N. Y. C. C., Sec. 1021.

**SEC. 1989.** An employé, who is expressly authorized to employ a substitute, is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

Responsibility of employé for substitute.

N. Y. C. C., Sec. 1022.

**SEC. 1990.** An employé, who is guilty of a culpable degree of negligence, is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

Responsibility for negligence.

N. Y. C. C., Sec. 1023.

**SEC. 1991.** Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

Surviving employé.

N. Y. C. C., Sec. 1024.

**SEC. 1992.** The obligations peculiar to confidential employments are defined in the Title on *Trusts*.

Confidential employment

N. Y. C. C., Sec. 1025.

## ARTICLE IV.

## TERMINATION OF EMPLOYMENT.

SECTION 1996. Termination by death, etc., of employer.

1997. Employment, how terminated.

1998. Continuance of service in certain cases.

1999. Termination at will.

2000. Termination by employer for fault.

2001. Termination by employé for fault.

2002. Compensation of employé dismissed for cause.

2003. Compensation of employé leaving for cause.

Termination  
by death, etc.,  
of employer.

SEC. 1996. Every employment, in which the power of the employé is not coupled with an interest in its subject, is terminated by notice to him of—

1. The death of the employer; or,
2. His legal incapacity to contract.

This section alters the common law by continuing the power until the agent has notice of the principal's change of condition. Such a rule is advocated by Story (Agency, Sec. 495), and is obviously just.

N. Y. C. C., Sec. 1026.

Employ-  
ment, how  
terminated.

SEC. 1997. Every employment is terminated—

1. By the expiration of its appointed term.
2. By the extinction of its subject.
3. By the death of the employé; or,
4. By his legal incapacity to act as such.

N. Y. C. C., Sec. 1027.

Continuance  
of services  
in certain  
cases.

SEC. 1998. An employé, unless the term of his service has expired, or unless he has a right to discontinue it at any time, without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employé for such service, according to the terms of the contract of employment.

N. Y. C. C., Sec. 1028.

Termination  
at will.

SEC. 1999. An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title.

N. Y. C. C., Sec. 1029.

**SEC. 2000.** An employment, even for a specified term, may be terminated at any time by the employer, in case of any wilful breach of duty by the employé in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

Termination  
by employer  
for fault.

N. Y. C. C., Sec. 1030.

**SEC. 2001.** An employment, even for a specified term, may be terminated by the employé at any time, in case of any wilful or permanent breach of the obligations of his employer to him as an employé, or of the death or incapacity of his employer; subject to the provisions of Sec. 1998.

Termination  
by employé  
for fault.

N. Y. C. C., Sec. 1031.

**SEC. 2002.** An employé, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

Compensa-  
tion of  
employé  
dismissed  
for cause.

N. Y. C. C., Sec. 1032.

**SEC. 2003.** An employé, who quits the service of his employer for good cause, is entitled to [such proportion of] the compensation which would become due in case of full performance [as the services which he has already rendered bear to the services which he was to render as full performance].

Compensa-  
tion of  
employé  
leaving for  
cause.

N. Y. C. C., Sec. 1033.

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## CHAPTER II.

### PARTICULAR EMPLOYMENTS.

#### ARTICLE I. MASTER AND SERVANT.

##### II. AGENTS.

##### III. FACTORS.

##### IV. SHIPMASTERS.

##### V. MATES AND SEAMEN.

##### VI. SHIPS' MANAGERS.

## ARTICLE I.

## MASTER AND SERVANT.

## SECTION 2009. Servant, what.

2010. Term of hiring.

2011. Same.

2012. Renewal of hiring.

2013. Time of service.

2014. Servant to pay over without demand.

2015. When servant may be discharged.

Servant,  
what.

SEC. 2009. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

N. Y. C. C., Sec. 1034.

Term of  
hiring.

SEC. 2010. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day: a hiring by piece work, for no specified term.

N. Y. C. C., Sec. 1035.

Same.

SEC. 2011. In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

Substitute for N. Y. C. C., Sec. 1036.

Renewal  
of hiring.

SEC. 2012. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

N. Y. C. C., Sec. 1037.

Time of  
service.

SEC. 2013. The entire time of a domestic servant belongs to the master; and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

N. Y. C. C., Sec. 1038.

Servant to  
pay over  
without  
demand.

SEC. 2014. A servant must deliver to his master, as soon as with reasonable diligence he can find him, every-

thing that he receives for his account, without demand; but he is not bound, without orders from his master, to send anything to him through another person.

N. Y. C. C., Sec. 1039.

SEC. 2015. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not—

When  
servant may  
be dis-  
charged.

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same; or,

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him.

N. Y. C. C., Sec. 1040.

## ARTICLE II.

### AGENTS.

SECTION 2019. Agent to conform to his authority.

2020. Must keep his principal informed.

2021. Collecting agent.

2022. Responsibility of sub-agent.

SEC. 2019. An agent must not exceed the limits of his actual authority, as defined by the Title on *Agency*.

N. Y. C. C., Sec. 1041.

Agent to  
conform to  
his authority

SEC. 2020. An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

N. Y. C. C., Sec. 1042.

Must keep  
his principal  
informed.

SEC. 2021. An agent employed to collect a negotiable instrument must collect it promptly, and take all measures necessary to charge the parties thereto, in case of its dishonor; and, if it is a bill of exchange, must present it for acceptance with reasonable diligence.

N. Y. C. C., Sec. 1043.

Collecting  
agent.

SEC. 2022. A mere agent of an agent is not responsible as such to the principal of the latter.

N. Y. C. C., Sec. 1044.

Responsibil-  
ity of sub-  
agent.

## ARTICLE III.

## FACTORS.

SECTION 2026. Factor, what.

2027. Obedience required from factor.

2028. Sales on credit.

2029. Liability of factor under guaranty commission.

2030. Factor cannot relieve himself from liability.

**Factor, what** - SEC. 2026. A factor is an agent who is employed by another to buy or sell property for him, and is vested by the latter with the possession of the property.

N. Y. C. C., Sec. 1045.

**Obedience  
required  
from factor.**

SEC. 2027. A factor must obey the instructions of his principal to the same extent as any other employé, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

N. Y. C. C., Sec. 1046.

**Sales on  
credit.**

SEC. 2028. A factor may sell property consigned to him, on such credit as is usual; but, having once agreed with the purchaser upon the term of credit, may not extend it.

N. Y. C. C., Sec. 1047.

**Liability of  
factor under  
guaranty  
commission.**

SEC. 2029. A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

N. Y. C. C., Sec. 1048.

**Factor can-  
not relieve  
himself from  
liability.**

SEC. 2030. A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself from responsibility therefor, without the consent of his principal.

N. Y. C. C., Sec. 1049.



## ARTICLE IV.

## SHIPMASTERS.

**SECTION 2034.** Appointment of master.

**2035.** When must be on board.

**2036.** Pilotage.

**2037.** Power of master over seamen.

**2038.** Power of master over passengers.

**2039.** Impressing private stores.

**2040.** When may abandon the ship.

**2041.** Duties on abandonment.

**2042.** When master cannot trade on his own account.

**2043.** Care and diligence.

**2044.** Authority of master.

**SEC. 2034.** The master of a ship is appointed by the owner, and holds during his pleasure.

Appoint-  
ment of  
master.

N. Y. C. C., Sec. 1050.

**SEC. 2035.** The master of a ship is bound to be always on board when entering or leaving a port, harbor or river.

When must  
be on board.

N. Y. C. C., Sec. 1051.

**SEC. 2036.** On entering or leaving a port, harbor or river, the master of a ship must take a pilot if one offers himself, and while the pilot is on board, the navigation of the ship devolves on him.

Pilotage.

N. Y. C. C., Sec. 1052.

**NORM.**—Regulations respecting pilots of this State are contained in the Political Code.

**SEC. 2037.** The master of a ship may enforce the obedience of the mate and seamen to his lawful commands by confinement and other reasonable corporal punishment, not prohibited by Acts of Congress, being responsible for the abuse of his power.

Power of  
master over  
seamen.

N. Y. C. C., Sec. 1053.

**SEC. 2038.** The master of a ship may confine any person on board, during a voyage, for wilful disobedience to his lawful commands.

Power of  
master over  
passengers.

N. Y. C. C., Sec. 1054.

**SEC. 2039.** If, during a voyage, the ship's supplies fail, the master, with the advice of the officers, may compel persons who have private supplies on board to surrender

Impressing  
private  
stores.

them for the common want, on payment of their value or giving security therefor.

N. Y. C. C., Sec. 1055.

When may  
abandon the  
ship.

SEC. 2040. The master of a ship must not abandon it during the voyage, without the advice of the other officers.

N. Y. C. C., Sec. 1056.

Duties on  
abandon-  
ment.

SEC. 2041. The master of a ship, upon abandoning it, must carry with him, so far as it is in his power, the money and the most valuable of the goods on board, under penalty of being personally responsible. If the articles thus taken are lost from causes beyond his control, he is exonerated from liability.

N. Y. C. C., Sec. 1057.

When mas-  
ter cannot  
trade on his  
own account.

SEC. 2042. The master of a ship, who engages for a common profit on the cargo, must not trade on his own account, and if he does, he must account to his employer for all profits thus made by him.

N. Y. C. C., Sec. 1058.

Care and  
diligence.

SEC. 2043. The master of a ship must use great care and diligence in the performance of his duties, and is responsible for all damage occasioned by his negligence, however slight.

N. Y. C. C., Sec. 1059.

Authority  
of master.

SEC. 2044. The authority and liability of the master of a ship, as an agent for the owners of the ship and cargo, are regulated by the Title on *Agency*.

N. Y. C. C., Sec. 1060.

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## ARTICLE V.

### MATES AND SEAMEN.

SECTION 2048. Mate, what.

2049. Seamen, what.

2050. Mate and seamen, how engaged and discharged.

2051. Unseaworthy vessel.

2052. Seamen not to lose wages or lien by agreement.

2053. Special agreement with seamen.

2054. Wages depend on freightage.

2055. When wages, etc., begin.

2056. Wages, where voyage is broken up before departure.

**SECTION 2057. Wrongful discharge.****2058. Wages, when not lost by wreck.****2059. Certificate.****2060. Disabled seamen.****2061. Maintenance of seamen during sickness.****2062. Death on the voyage.****2063. Theft, etc., forfeits wages.****2064. Seamen cannot ship goods.****2065. Embezzlement and injuries.****2066. Law governing seamen.**

**Sec. 2048.** The mate of a ship is the officer next in rank to the master, and in case of the master's disability he must take his place. By so doing he does not lose any of his rights as mate. Mate, what.

**N. Y. C. C., Sec. 1061.**

**Sec. 2049.** All persons employed in the navigation of a ship, or upon a voyage, other than the master and mate, are to be deemed seamen, within the provisions of this Code. Seamen, what.

**N. Y. C. C., Sec. 1062.**

**Sec. 2050.** The mate and seamen of a ship are engaged by the master, and may be discharged by him at any period of the voyage, for wilful and persistent disobedience or gross disqualification, but cannot otherwise be discharged before the termination of the voyage. Mate and seamen, how engaged and discharged.

**N. Y. C. C., Sec. 1063.**

**Sec. 2051.** A mate or seaman is not bound to go to sea in a ship that is not seaworthy; and if there is reasonable doubt of its seaworthiness, he may refuse to proceed until a proper survey has been had. Unseaw'orthy vessel.

**N. Y. C. C., Sec. 1064.**

**Sec. 2052.** A seaman cannot, by reason of any agreement, be deprived of his lien upon the ship, or of any remedy for the recovery of his wages to which he would otherwise have been entitled. Any stipulation by which he consents to abandon his right to wages in case of the loss of the ship, or to abandon any right he may have or obtain in the nature of salvage, is void. Seaman not to lose wages or lien by agreement.

**N. Y. C. C., Sec. 1065.**

**Sec. 2053.** No special agreement entered into by a seaman can impair any of his rights, or add to any of his Special agreement with seamen

obligations, as defined by law, unless he fully understands the effect of the agreement, and receives a fair compensation therefor.

N. Y. C. C., Sec. 1066.

Wages  
depend on  
freightage.

SEC. 2054. Except as hereinafter provided, the wages of seamen are due when, and so far only as, freightage is earned, unless the loss of freightage is owing to the fault of the owner or master.

N. Y. C. C., Sec. 1067.

When wages  
etc., begin.

SEC. 2055. The right of a mate or seaman to wages and provisions begins either from the time he begins work, or from the time specified in the agreement for his beginning work, or from his presence on board, whichever first happens.

N. Y. C. C., Sec. 1068.

Wages,  
where voy-  
age is broken  
up before  
departure.

SEC. 2056. Where a voyage is broken up before departure of the ship, the seamen must be paid for the time they have served, and may retain for their indemnity such advances as they have received.

N. Y. C. C., Sec. 1069.

Wrongful  
discharge.

SEC. 2057. When a mate or seaman is wrongfully discharged, or is driven to leave the ship by the cruelty of the master on the voyage, it is then ended with respect to him, and he may thereupon recover his full wages.

N. Y. C. C., Sec. 1070.

Wages when  
not lost by  
wreck.

SEC. 2058. In case of loss or wreck of the ship, a seaman is entitled to his wages up to the time of the loss or wreck, whether freightage has been earned or not, if he exerts himself to the utmost to save the ship, cargo and stores.

This provision is substantially enacted in England (Stats. 7 & 8 Vict., Chap. 112, Sec. 17), making the seaman's right, however, absolutely dependant upon the officer's certificate.

N. Y. C. C., Sec. 1071.

Certificate.

SEC. 2059. A certificate from the master or chief surviving officer of a ship, to the effect that a seaman exerted himself to the utmost to save the ship, cargo and stores, is presumptive evidence of the fact.

N. Y. C. C., Sec. 1072.

**SEC. 2060.** Where a mate or seaman is prevented from rendering service by illness or injury, incurred without his fault in the discharge of his duty on the voyage, or by being wrongfully discharged, or by a capture of the ship, he is entitled to wages notwithstanding; but in case of capture, a ratable deduction for salvage is to be made.

Disabled  
seamen.

N. Y. C. C., Sec. 1073.

**SEC. 2061.** If a mate or seaman becomes sick or disabled during the voyage, without his fault, the expense of furnishing him with suitable medical advice, medicine, attendance, and other provision for his wants, must be borne by the ship till the close of the voyage.

Maintenance  
of seamen  
during sick-  
ness.

N. Y. C. C., Sec. 1074.

**SEC. 2062.** If a mate or seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage.

Death on the  
voyage.

N. Y. C. C., Sec. 1075.

**SEC. 2063.** Desertion of the ship without cause, or a justifiable discharge by the master during the voyage, for misconduct, or a theft of any part of the cargo or appurtenances of the ship, or a wilful injury thereto or to the ship, forfeits all wages due for the voyage to a mate or seaman thus in fault.

Theft, etc.,  
forfeits  
wages.

N. Y. C. C., Sec. 1076.

**SEC. 2064.** A mate or seaman may not, under any pretext, ship goods on his own account without permission from the master.

Seamen  
cannot ship  
goods.

N. Y. C. C., Sec. 1077.

**SEC. 2065.** If any part of the cargo or appurtenances of a ship is embezzled or injured by the mate or a seaman, the offender, or, if it is not known which is the offender, all those of whom negligence or fault may be presumed, must make good the loss.

Embezzle-  
ment and  
injuries.

N. Y. C. C., Sec. 1078.

**SEC. 2066.** The shipment of officers and seamen, and their rights and duties, are further regulated by Acts of Congress.

Law govern-  
ing seamen.

N. Y. C. C., Sec. 1079.

## ARTICLE VI.

## SHIPS' MANAGERS.

SECTION 2070. Manager, what.

2071. Duties of manager.

2072. Compensation.

Manager,  
what.

SEC. 2070. The general agent for the owners, in respect to the care of a ship and freight, is called the manager. If he is a part owner he is also called the managing owner.

N. Y. C. C., Sec. 1080.

Duties of  
manager.

SEC. 2071. Unless otherwise directed, it is the duty of the manager of a ship to provide for the complete seaworthiness of a ship; to take care of it in port; to see that it is provided with necessary papers, with a proper master, mate and crew, and supplies of provisions and stores.

N. Y. C. C., Sec. 1081.

Compensa-  
tion.

SEC. 2072. A managing owner is presumed to have no right to compensation for his own services.

N. Y. C. C., Sec. 1082.

## CHAPTER III.

## SERVICE WITHOUT EMPLOYMENT.

SECTION 2078. Voluntary interference with property.

2079. Salvage.

Voluntary  
interference  
with prop-  
erty.

SEC. 2078. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession, for the purpose of rendering a service about it, must complete such service, and use ordinary care, diligence and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses, incurred by him about such service, from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

N. Y. C. C., Sec. 1083.

**SEC. 2079.** Any person, other than the master, mate or a seaman thereof, who rescues a ship, her appurtenances or cargo from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1084.

## TITLE VII.

### CARRIAGE.

- CHAPTER I. CARRIAGE IN GENERAL.**  
**II. CARRIAGE OF PERSONS.**  
**III. CARRIAGE OF PROPERTY.**  
**IV. CARRIAGE OF MESSAGES.**  
**V. COMMON CARRIERS.**

### CHAPTER I.

#### CARRIAGE IN GENERAL.

**SECTION 2085.** Contract of carriage.

2086. Different kinds of carriers.

2087. Marine and inland carriers, what.

2088. Carriers by sea.

2089. Obligations of gratuitous carriers.

2090. Obligations of gratuitous carrier who has begun to carry.

**SEC. 2085.** The contract of carriage is a contract for the conveyance of property, persons or messages, from one place to another.

Contract of carriage.

N. Y. C. C., Sec. 1085.

**SEC. 2086.** Carriage is either—

1. Inland; or,

2. Marine.

Different kinds of carriers.

N. Y. C. C., Sec. 1086.

**SEC. 2087.** Carriers upon the ocean and upon arms of the sea are marine carriers. All others are inland carriers.

Marine and inland carriers, what.

N. Y. C. C., Sec. 1087.

Carriers  
by sea.

SEC. 2088. Rights and duties peculiar to carriers by sea, are defined by Acts of Congress.

N. Y. C. C., Sec. 1089.

Obligations  
of gratuitous  
carriers.

SEC. 2089. Carriers without reward are subject to the same rules as employés without reward, except so far as is otherwise provided by this Title.

N. Y. C. C., Sec. 1090.

Obligations  
of gratuitous  
carrier who  
has begun  
to carry.

SEC. 2090. A carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage.

N. Y. C. C., Sec. 1091.

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## CHAPTER II.

### CARRIAGE OF PERSONS.

#### ARTICLE I. GRATUITOUS CARRIAGE.

#### II. CARRIAGE FOR REWARD.

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#### ARTICLE I.

##### GRATUITOUS CARRIAGE OF PERSONS.

##### SECTION 2096. Degree of care required.

Degree of  
care re-  
quired.

SEC. 2096. A carrier of persons without reward must use ordinary care and diligence for their safe carriage.

N. Y. C. C., Sec. 1092.

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#### ARTICLE II.

##### CARRIAGE FOR REWARD.

##### SECTION 2100. General duties of carrier.

2101. Vehicles.

2102. Not to overload his vehicle.

2103. Treatment of passengers.

2104. Rate of speed and delays.

General du-  
ties of car-  
rier.

SEC. 2100. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must



ing necessary for that purpose, and must  
nd a reasonable degree of skill.

Y. C. C., Sec. 1093.

carrier of persons for reward is bound  
is safe and fit for the purposes to which  
is not excused for default in this respect  
care.

Vehicles.

Y. C. C., Sec. 1094.

carrier of persons for reward must not  
rload his vehicle.

Not to over-  
load his  
vehicle.

Y. C. C., Sec. 1095.

carrier of persons for reward must give  
such accommodations as are usual and  
treat them with civility, and give them  
ee of attention.

Treatment  
of passen-  
gers.

Y. C. C., Sec. 1096.

carrier of persons for reward must travel  
ate of speed, and without any unreason-  
iation from his proper route.

Rate of speed  
and delays.

Y. C. C., Sec. 1097.

## CHAPTER III.

### CARRIAGE AND PROPERTY.

#### I. GENERAL DEFINITIONS.

#### II. OBLIGATIONS OF THE CARRIER.

#### III. BILL OF LADING.

#### IV. FREIGHTAGE.

#### V. GENERAL AVERAGE.

### ARTICLE I.

#### GENERAL DEFINITIONS.

it, consignor, etc., what.

roperty carried is called freight, the re-  
e paid for its carriage is called freight-  
who delivers the freight to the carrier is

Freight, con-  
signor, etc.,  
what.

called the consignor, and the person to whom it is to be delivered is called the consignee.

N. Y. C. C., Sec. 1098.

## ARTICLE II.

### OBLIGATIONS OF THE CARRIER.

**SECTION 2114.** Care and diligence required of carriers.

2115. Carrier to obey directions.

2116. Conflict of orders.

2117. Stowage, deviation, etc.

2118. Delivery of freight.

2119. Place of delivery.

2120. Obligations of carrier when freight is not delivered to consignee.

2121. How carrier may terminate his liability.

2122. When consignee cannot be found.

Care and  
diligence  
required of  
carriers.

**SEC. 2114.** A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties. A carrier without reward must use at least slight care and diligence.

N. Y. C. C., Sec. 1099.

Carrier to  
obey direc-  
tions.

**SEC. 2115.** A carrier must comply with the directions of the consignor or consignee, to the same extent that an employé is bound to comply with those of his employer.

N. Y. C. C., Sec. 1100.

Conflict  
of orders.

**SEC. 2116.** When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee inconsistent with his own.

N. Y. C. C., Sec. 1101.

Stowage, de-  
viation, etc.

**SEC. 2117.** A marine carrier must not stow freight upon deck during the voyage, except where it is usual to do so, nor make any improper deviation from or delay in the voyage, nor do any other unnecessary act which would avoid an insurance in the usual form upon the freight.

N. Y. C. C., Sec. 1102.

**SEC. 2118.** A carrier of property must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place.

Delivery  
of freight.

N. Y. C. C., Sec. 1103.

**SEC. 2119.** If there is no usage to the contrary at the place of delivery, freight must be delivered as follows:

Place of  
delivery.

1. If carried upon a railway owned or managed by the carrier, it may be delivered at the station nearest to the place to which it is addressed.

2. If carried by sea from a foreign country, it may be delivered at the wharf where the ship moors, within a reasonable distance from the place of address; or, if there is no wharf, on board a lighter alongside the ship; or,

3. In other cases, it must be delivered to the consignee or his agent, personally, if either can, with reasonable diligence, be found.

N. Y. C. C., Sec. 1104.

**SEC. 2120.** If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a carrier, until the consignee has had a reasonable time to remove it.

Obligations  
of carrier  
when freight  
is not deliv-  
ered to con-  
signee.

N. Y. C. C., Sec. 1105.

**SEC. 2121.** If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfil the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, and giving notice thereof to the consignee.

How carrier  
may ter-  
minate his  
liability.

N. Y. C. C., Sec. 1106.

**SEC. 2122.** If a consignee of freight cannot, with reasonable diligence, be found, the carrier may place it in a suitable warehouse for his account, but must give notice thereof to the consignor.

When con-  
signee can-  
not be found.

N. Y. C. C., Sec. 1107.

## ARTICLE III.

## BILL OF LADING.

**SECTION 2126.** Bill of lading, what.

2127. Bill of lading negotiable.

2128. Same.

2129. Effect of bill of lading on rights, etc., of carrier.

2130. Bills of lading to be given to consignor.

2131. Carrier exonerated by delivery according to bill of lading.

2132. Carrier may demand surrender of bill of lading before delivery.

Bill of lading, what.

**SEC. 2126.** A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

N. Y. C. C., Sec. 1108.

Bill of lading negotiable.

**SEC. 2127.** All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

This provision is conformable to the general intention of merchants, and it is not certain that it is not the law of this State (see *Dows vs. Greene*, 24 N. Y., 638; *Dows vs. Rush*, 28 Barb., 185; but compare *Dows vs. Perrin*, 16 N. Y., 832). A provision, somewhat similar, has been enacted in England (18 & 19 Vict., Chap. 111); and in this State (Laws 1859, Chap. 353).

N. Y. C. C., Sec. 1109.

Same.

**SEC. 2128.** When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

N. Y. C. C., Sec. 1110.

Effect of bill of lading on rights, etc., of carrier.

**SEC. 2129.** A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

N. Y. C. C., Sec. 1111.

Bills of lading to be given to consignor.

**SEC. 2130.** A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading, of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the con-

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weight from him, and recover from  
the thereby occasioned.

N. Y. C. C., Sec. 1112.

or is exonerated from liability for  
thereof, in good faith, to any holder  
of a bill of lading therefor, properly indorsed, or made in  
favor of the bearer.

N. Y. C. C., Sec. 1113.

NOTE.—This is a necessary result of Sec. 2127.

Sec. 2132. When a carrier has given a bill of lading,  
or other instrument substantially equivalent thereto, he  
may require its surrender, or a reasonable indemnity  
against claims thereon, before delivering the freight.

N. Y. C. C., Sec. 1114.

## ARTICLE IV.

### FREIGHTAGE.

Section 2136. When freightage is to be paid.

2137. Consignor, when liable for freightage.

2138. Consignee, when liable.

2139. Natural increase of freight.

2140. Apportionment by contract.

2141. Same.

2142. Apportionment according to distance.

2143. Freight carried further than agreed, etc.

2144. Carrier's lien for freightage.

Sec. 2136. A carrier may require his freightage to be  
paid upon his receiving the freight; but if he does not de-  
mand it then, he cannot until he is ready to deliver the  
freight to the consignee.

N. Y. C. C., Sec. 1115.

Sec. 2137. The consignor of freight is presumed to be  
liable for the freightage, but if the contract between him  
and the carrier provides that the consignee shall pay it,  
and the carrier allows the consignee to take the freight,  
he cannot afterwards recover the freightage from the  
consignor.

N. Y. C. C., Sec. 1116.

Consignee,  
when liable.

SEC. 2138. The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it.

N. Y. C. C., Sec. 1117.

Natural in-  
crease of  
freight.

SEC. 2139. No freightage can be charged upon the natural increase of freight.

N. Y. C. C., Sec. 1118.

Apportion-  
ment by  
contract.

SEC. 2140. If freightage is apportioned by a bill of lading or other contract made between a consignor and carrier, the carrier is entitled to payment, according to the apportionment, for so much as he delivers.

N. Y. C. C., Sec. 1119.

Same.

SEC. 2141. If a part of the freight is accepted by a consignee, without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part, though not apportioned in the original contract.

N. Y. C. C., Sec. 1120.

Apportion-  
ment accord-  
ing to dis-  
tance.

SEC. 2142. If a consignee voluntarily receives freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freightage, according to distance. If the carrier, being ready and willing, offers to complete the transit, he is entitled to the full freightage. If he does not thus offer completion, and the consignee receives the freight only from necessity, the carrier is not entitled to any freightage.

N. Y. C. C., Sec. 1121.

Freight car-  
ried further  
than agreed,  
etc.

SEC. 2143. If freight is carried further, or more expeditiously, than was agreed upon by the parties, the carrier is not entitled to additional compensation, and cannot refuse to deliver it, on the demand of the consignee, at the place and time of its arrival.

N. Y. C. C., Sec. 1122.

Carrier's  
lien for  
freightage.

SEC. 2144. A carrier has a lien for freightage, which is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1123.

## ARTICLE V.

## GENERAL AVERAGE.

and general average, what.  
 jettison.  
 made.  
 borne.  
 average loss, how adjusted.  
 how ascertained.  
 owed on deck.  
 on of the foregoing rules.

Sec. 2148. A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard, or otherwise sacrifice, any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison, and the loss incurred thereby is called a general average loss.

Jettison and  
general av-  
erage, what.

N. Y. C. C., Sec. 1124.

Sec. 2149. A jettison must begin with the most bulky and least valuable articles, so far as possible.

Order of  
jettison.

N. Y. C. C., Sec. 1125.

Sec. 2150. A jettison can be made only by authority of the master of a ship, except in case of his disability, or of an overruling necessity, when it may be made by any other person.

By whom  
made.

N. Y. C. C., Sec. 1126.

Sec. 2151. The loss incurred by a jettison, when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freightage and cargo, for the benefit of which the sacrifice is made, as well as by the owner of the thing sacrificed.

Loss, how  
borne.

N. Y. C. C., Sec. 1127.

Sec. 2152. The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost, as the value of his part of the property affected bears to the value of the whole. But an adjustment

General av-  
erage loss,  
how ad-  
justed.

made at the end of the voyage, if valid there, is valid everywhere.

N. Y. C. C., Sec. 1128.

Values, how  
ascertained.

SEC. 2153. In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution.

N. Y. C. C., Sec. 1129.

Things  
stowed on  
deck.

SEC. 2154. The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage.

N. Y. C. C., Sec. 1130.

Application  
of the fore-  
going rules.

SEC. 2155. The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, or expense necessarily incurred, for the preservation of the ship and cargo from extraordinary perils.

N. Y. C. C., Sec. 1131.

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## CHAPTER IV.

### CARRIAGE OF MESSAGES.

SECTION 2161. Obligations of carrier of messages.

2162. Degree of care and diligence required.

Obligations  
of carrier of  
messages.

SEC. 2161. A carrier of messages for reward must deliver them at the place to which they are addressed, or to the persons for whom they are intended.

N. Y. C. C., Sec. 1132.

Degree of  
care and  
diligence  
required.

SEC. 2162. A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein.

Obviously, messages are sent by telegraph for the express purpose of securing great dispatch. This is an implied condition of the contract, which should be strictly enforced.

N. Y. C. C., Sec. 1133.

NOTE.—See Secs. 2207 and 540.



## CHAPTER V.

## COMMON CARRIERS.

COMMON CARRIERS IN GENERAL.  
 COMMON CARRIERS OF PERSONS.  
 COMMON CARRIERS OF PROPERTY.  
 COMMON CARRIERS OF MESSAGES.

## ARTICLE I.

## COMMON CARRIERS IN GENERAL.

carrier, what.  
 to accept freight.  
 not to give preference.  
 preference he must give.

ation.  
 of carrier altered only by agreement.  
 agreements void.  
 written contract.

one who offers to the public to carry  
 or messages, is a common carrier of  
 offers to carry.

Common  
 carrier, what

C. C., Sec. 1134.

common carrier must, if able to do so,  
 whatever is offered to him, at a reason-  
 , of a kind that he undertakes or is

Obligation  
 to accept  
 freight.

C. C., Sec. 1135.

common carrier must not give preference,  
 otherwise, to one person over another,  
 unless authorized by statute.

Obligation  
 not to give  
 preference.

C. C., Sec. 1136.

common carrier must always give a pre-  
 ference in time, and may give a preference in price, to  
 the United States and to this State.

What prefer-  
 ence he must  
 give.

N. Y. C. C., Sec. 1137.

Sec. 2172. A common carrier must start at such time  
 and place as he announces to the public.

Starting.

N. Y. C. C., Sec. 1138.

Compensation.

SEC. 2173. A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry.

N. Y. C. C., Sec. 1139.

Obligations of carrier altered only by agreement.

SEC. 2174. The rights and obligations of a common carrier cannot be altered by notice on his part, or by any other means, except a written agreement between him and the person with whom he deals.

*Nevins vs. Bay State Steamboat Co.*, 4 Bosw., 225; *Cole vs. Goodwin*, 19 Wend., 251; approved. *Dorr vs. N. J. Steam Nav. Co.*, 11 N. Y., 485.

This provision is new, in so far as it requires the agreement to be written; but it seems eminently desirable that such should be the law.

N. Y. C. C., Sec. 1140.

Certain agreements void.

SEC. 2175. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants.

*Penn. R. R. vs. McCloskey*, 23 Penn. St., 532; *Camden & Amboy R. R. vs. Baldauff*, 16 id., 67; *Smitn vs. N. Y. Central R. R.*, 29 Barb., 142; affirmed, 24 N. Y., 222. The latest cases in this State seem to hold that the carrier may be exempted from such liability for the acts of his servants (*Bissell vs. N. Y. Central R. R.*, 25 N. Y., 442; reversing S. C., 29 Barb., 502; *Perkins vs. N. Y. Central R. R.*, 24 N. Y., 196; *Wells vs. Same*, id., 181). But these decisions were made by a bare majority of the Court of Appeals, and the Commissioners think that the dissenting opinions are entitled to the most weight. It is notorious that the negligence of railroad managers cannot be stopped by criminal prosecutions, and if they are enabled, by a reduction of a few cents in the fare, to escape a civil action, they will be practicably irresponsible for the acts of their servants.

N. Y. C. C., Sec. 1141.

Effect of written contract.

SEC. 2176. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same.

*Nevins vs. Bay State Steamboat Co.*, 4 Bosw., 225. This appears to the Commissioners to be the only sound rule, notwithstanding its apparent repudiation by a bare majority of the Court of Appeals (see *Bissell vs. N. Y. Central R. R.*, 25 N. Y., 442).

N. Y. C. C., Sec. 1142.

## ARTICLE II.

## COMMON CARRIERS OF PERSONS.

tion to carry luggage.  
 ge, what.  
 ty for luggage.  
 ge, how carried and delivered.  
 tion to provide vehicles.  
 or passengers.  
 tions for conduct of business.  
 when payable.  
 n of passengers.  
 ot payable after ejection.  
 's lien.

ommon carrier of persons, unless his  
 for the reception of passengers exclu-  
 ive and carry a reasonable amount of  
 passenger, without any charge except  
 weight over one hundred pounds to a

Obligation  
 to carry  
 luggage.

C. C. C., Sec. 1143.

ggage may consist of any articles in-  
 s of a passenger while travelling, or for  
 ment.

Luggage,  
 what.

C. C. C., Sec. 1144.

liability of a carrier for luggage re  
 h a passenger is the same as that of a  
 f property.

Liability for  
 luggage.

C. C. C., Sec. 1145.

ommon carrier must deliver every pas-  
 whether within the prescribed weight  
 ly upon the arrival of the passenger at  
 and, unless the vehicle would be over-  
 aded thereby, must carry it on the same  
 he carries the passenger to whom it

Luggage,  
 how carried  
 and deliv-  
 ered.

C. C. C., Sec. 1146.

ommon carrier of persons must provide  
 er of vehicles to accommodate all the  
 an be reasonably expected to require  
 e time.

Obligation  
 to provide  
 vehicles.

C. C. C., Sec. 1147.

Seats for  
passengers.

SEC. 2185. A common carrier of persons must provide every passenger with a seat. [He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows.]

N. Y. C. C., Sec. 1148.

Regulations  
for conduct  
of business.

SEC. 2186. A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable.

N. Y. C. C., Sec. 1149.

Fare, when  
payable.

SEC. 2187. A common carrier may demand the fare of passengers, either at starting or at any subsequent time.

N. Y. C. C., Sec. 1150.

Ejection of  
passengers.

SEC. 2188. A passenger, who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and within a short distance from some dwelling house.

N. Y. C. C., Sec. 1151.

Fare not  
payable after  
ejection.

SEC. 2189. After having ejected a passenger, a carrier has no right to require the payment of any part of his fare.

N. Y. C. C., Sec. 1152.

Carrier's  
lien.

SEC. 2190. A common carrier has a lien upon the luggage of a passenger, for the payment of such fare as he is entitled to from him. This lien is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1153.

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## ARTICLE III.

### COMMON CARRIERS OF PROPERTY.

SECTION 2194. Liability of inland carriers for loss.

2195. When exemptions do not apply.

2196. Liability for delay.

2197. Liability of marine carriers.

2198. Same.

2199. Perils of sea, what.

2200. Consignor of valuables to declare their nature.

2201. Delivery of freight beyond usual route.

2202. Proof to be given in case of loss.

2203. Carrier's services, other than carriage and delivery.

as the consignor accompanies the exclusive control thereof, an inland property is liable, from the time that relieves himself from liability pursuant 2, for the loss or injury thereof from , except—  
fect, vice or weakness, or a spontane-  
roperty itself.  
ible enemy of the United States or of

Liability of  
inland car-  
riers for loss.

law ; or,  
superhuman cause.

C. C., Sec. 1154.

amon carrier is liable, even in the cases  
section, if his ordinary negligence ex-  
to the cause of the loss.

When ex-  
emptions do  
not apply.

C. C., Sec. 1155.

amon carrier is liable for delay, only  
of his ordinary negligence.

Liability  
for delay.

C. C., Sec. 1156.

rine carrier is liable in like manner as  
except for loss or injury caused by the  
fire.

Liability  
of marine  
carriers.

C. C., Sec. 1157.

iability of a common carrier by sea is  
7 Acts of Congress.

Same.

C. C., Sec. 1158.

s of the sea are from—

Perils of sea,  
what.

ives.

and rapids.

s, though of human origin. •

mate.

nt necessary at sea.

ar to the sea ; and,

ers peculiar to the sea.

C. C., Sec. 1159. •

mon carrier of gold, silver, platinum  
or of imitations thereof, in a manufac-  
tured state, of time-pieces of any de-

Consignor  
of valuables  
to declare  
their nature .

scription, of negotiable paper or other valuable writings, of pictures, glass or China ware, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight.

Modified from the English Carriers' Act of 1830. The Act of Congress (March 3, 1851,) does not include so many articles.

N. Y. C. C., Sec. 1160.

Delivery of freight beyond usual route.

SEC. 2201. If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

N. Y. C. C., Sec. 1161.

Proof to be given in case of loss.

SEC. 2202. If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.

This clause is intended to save the consignor from the risk of mistaken actions, by compelling the carrier to give proof that another is liable, the fair presumption being against him.

N. Y. C. C., Sec. 1162.

Carrier's services, other than carriage and delivery.

SEC. 2203. In respect to any service rendered by a common carrier about freight, other than its carriage and delivery, his rights and obligations are defined by the Titles on *Deposit* and *Service*.

N. Y. C. C., Sec. 1163.

#### ARTICLE IV.

##### COMMON CARRIERS OF MESSAGES.

SECTION 2207. Order of transmission of telegraphic messages.

2208. Order in other cases.

2209. Damages when message is refused or postponed.

Order of transmission of telegraphic messages.

SEC. 2207. A carrier of messages by telegraph must, if it is practicable, transmit every such message immedi-

ately upon its receipt. But if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order:

1. Messages from public agents of the United States or of this State, on public business.

2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use.

3. Messages giving information relating to the sickness or death of any person.

4. Other messages, in the order in which they were received.

N. Y. C. C., Sec. 1164.

NOTE.—Secs. 2207, 2209, 2161, 240 and 242 of this Code, must be examined and adjusted.

Sec. 2208. A common carrier of messages, otherwise than by telegraph, must transmit messages in the order in which he receives them, except messages from agents of the United States or of this State, on public business, to which he must always give priority. But he may fix upon certain times for the simultaneous transmission of messages previously received.

Order in  
other cases.

N. Y. C. C., Sec. 1165.

Sec. 2209. Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto.

Damages  
when mes-  
sage is re-  
fused or  
postponed.

NEW. Such a provision is needed to protect the rights of parties who are seriously annoyed by delays which nevertheless cannot be shown to have caused them pecuniary damage.

N. Y. C. C., Sec. 1166.

## TITLE VIII.

### TRUST.

#### CHAPTER I. TRUSTS IN GENERAL.

#### II. TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

## CHAPTER I.

## TRUSTS IN GENERAL.

## ARTICLE I. NATURE AND CREATION OF A TRUST.

## II. OBLIGATIONS OF TRUSTEES.

## III. OBLIGATIONS OF THIRD PERSONS.

## ARTICLE I.

## NATURE AND CREATION OF A TRUST.

## SECTION 2215. Trusts classified.

2216. Voluntary trust, what.

2217. Involuntary trust, what.

2218. Parties to the contract.

2219. What constitutes one a trustee.

2220. For what purpose a trust may be created.

2221. Voluntary trust, how created as to trustor.

2222. How created as to trustee.

2223. Involuntary trustee, who is.

2224. Involuntary trust resulting from negligence, etc.

Trusts clas-  
sified.

SEC. 2215. A trust is either—

1. Voluntary; or,

2. Involuntary.

N. Y. C. C., Sec. 1167.

Voluntary  
trust, what.

SEC. 2216. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by one, for the benefit of another.

A trust is defined by Story as an equitable title to property (Eq. Jur., Sec. 964). But this is a very narrow definition. So far as his obligations are concerned, a technical trustee stands upon the same footing with a confidential agent or adviser, a guardian, etc., and there is little difference, so far as business relations are concerned, between his position and that of a husband, wife, parent, or attorney. The confidence reposed is the essence of the relation, and it will be found, by reference to the numerous cases cited in the course of this Title, that little or no distinction is made between trustees, strictly so called, and any other persons who accept the personal confidence of another.

N. Y. C. C., Sec. 1168.

Involuntary  
trust, what.

SEC. 2217. An involuntary trust is one which is created by operation of law.

N. Y. C. C., Sec. 1169.

Parties to  
the contract.

SEC. 2218. The person whose confidence creates a trust, is called the trustor; the person in whom the con-



fidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary.

Lewis, Hill, and other writers, call the creator of the trust the "settlor," a very objectionable word. Trustor is an English word (see Webster's Dictionary, where it is spelled "truster"), and is entirely applicable to the person who creates a trust.

N. Y. C. C., Sec. 1170.

**SEC. 2219.** Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

What constitutes one a trustee.

N. Y. C. C., Sec. 1171.

**SEC. 2220.** A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the Titles on *Uses and Trusts* and on *Transfers*.

For what purpose a trust may be created.

N. Y. C. C., Sec. 1172.

**SEC. 2221.** Subject to the provisions of Sec. 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty—

Voluntary trust, how created as to trustor.

1. An intention on the part of the trustor to create a trust; and,

2. The subject, purpose and beneficiary of the trust.

N. Y. C. C., Sec. 1173.

**SEC. 2222.** Subject to the provisions of Sec. 852, a voluntary trust is created, as to the trustee, by any words or acts of his, indicating with reasonable certainty—

How created as to trustee.

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

2. The subject, purpose and beneficiary of the trust.

N. Y. C. C., Sec. 1174.

**SEC. 2223.** One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

Involuntary trustee, who is.

This is a familiar principle of equity in cases of title gained through fraud, mistake, undue influence, or the violation of a trust (*Brown vs. Lynch*, 1 Paige, 147; *Wood vs.*

Rowcliffe, 2 Phil., 382; 3 Hare, 304; see *Anderson vs. Lemon*, 8 N. Y., 236). There seems to be no reason for refusing to extend the rule to all cases of wrongful detention.

N. Y. C. C., Sec. 1175.

Involuntary trust resulting from negligence, etc.

SEC. 2224. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

N. Y. C. C., Sec. 1176.

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

SECTION 2228. Trustee's obligation to good faith.

2229. Trustee not to use property for his own profit.

2230. Certain transactions forbidden.

2231. Trustee's influence not to be used for his advantage.

2232. Trustee not to assume a trust adverse to interest of beneficiary.

2233. To disclose adverse interest.

2234. Trustee guilty of fraud, when.

2235. Presumption against trustees.

2236. Trustee mingling trust property with his own.

2237. Measure of liability for breach of trust.

2238. Same.

2239. Co-trustees, how far liable for each other.

Trustee's obligation to good faith.

SEC. 2228. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter, by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

N. Y. C. C., Sec. 1177.

Trustee not to use property for his own profit.

SEC. 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.

N. Y. C. C., Sec. 1178.

Certain transactions forbidden.

SEC. 2230. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

**1.** When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so.

**2.** When, the beneficiary not having capacity to contract, the proper Court, upon the like information of the facts, grants the like permission; or,

**3.** When, some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper Court for the latter, in the manner above prescribed.

N. Y. C. C., Sec. 1179.

**SEC. 2231.** A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

Trustee's influence not to be used for his advantage.

N. Y. C. C., Sec. 1180.

**SEC. 2232.** No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

Trustee not to assume a trust adverse to interest of beneficiary.

N. Y. C. C., Sec. 1181.

**SEC. 2233.** If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

To disclose adverse interest.

N. Y. C. C., Sec. 1182.

**SEC. 2234.** Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.

Trustee guilty of fraud, when.

N. Y. C. C., Sec. 1183.

**SEC. 2235.** All transactions between a trustee and his beneficiary, during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

Presumption against trustees.

N. Y. C. C., Sec. 1184.

**SEC. 2236.** A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to consti-

Trustee mingling trust property with his own.

tute himself in appearance its absolute owner, is liable for its safety in all events.

N. Y. C. C., Sec. 1185.

Measure of liability for breach of trust.

SEC. 2237. A trustee who uses or disposes of the trust property, contrary to Sec. 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest.

N. Y. C. C., Sec. 1186.

Same.

SEC. 2238. A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error.

N. Y. C. C., Sec. 1187.

Co-trustees, how far liable for each other.

SEC. 2239. A trustee is responsible for the wrongful acts of a co-trustee, to which he consented, or which by his negligence he enabled the latter to commit; but for no others.

N. Y. C. C., Sec. 1188.

### ARTICLE III.

#### OBLIGATIONS OF THIRD PERSONS.

SECTION 2243. Third person, when involuntary trustee.

2244. When third person must see to application of trust property.

Third person, when involuntary trustee.

SEC. 2243. Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration.

N. Y. C. C., Sec. 1189.

When third person must see to application of trust property.

SEC. 2244. One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them.

N. Y. C. C., Sec. 1190.

## CHAPTER II.

## TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

## ARTICLE I. NATURE AND CREATION OF THE TRUST.

## II. OBLIGATIONS OF TRUSTEES.

## III. POWERS OF TRUSTEES.

## IV. RIGHTS OF TRUSTEES.

## V. TERMINATION OF THE TRUST.

## VI. SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

## ARTICLE I.

## NATURE AND CREATION OF THE TRUST.

SECTION 2250. Who are trustees within scope of this chapter.

2251. Creation of trust.

2252. Trustee appointed by Court.

2253. Declaration of trust.

2254. Same.

SEC. 2250. The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators and guardians, as such.

Who are trustees within scope of this chapter.

N. Y. C. C., Sec. 1191.

SEC. 2251. The mutual consent of a trustor and trustee creates a trust, of which the beneficiary may take advantage at any time prior to its rescission.

Creation of trust.

N. Y. C. C., Sec. 1192.

SEC. 2252. When a trustee is appointed by a Court or public officer, as such, such Court or officer is the trustor, within the meaning of the last section.

Trustee appointed by Court.

N. Y. C. C., Sec. 1193.

SEC. 2253. The nature, extent and object of a trust are expressed in the declaration of trust.

Declaration of trust.

N. Y. C. C., Sec. 1194.

SEC. 2254. All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration

Same.

of trust is made in writing, all previous declarations by the same trustor are merged therein.

N. Y. C. C., Sec. 1195.

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

**SECTION 2258.** Trustees must obey declaration of trust.

2259. Degree of care and diligence in execution of trust.

2260. Duty of trustee as to appointment of successor.

2261. Investment of money by trustee.

2262. Interest, simple or compound, on omission to invest trust moneys.

2263. Purchase by trustee of claims against trust fund.

Trustee  
must obey  
declaration  
of trust.

**SEC. 2258.** A trustee must fulfil the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employé.

N. Y. C. C., Sec. 1196.

Degree of  
care and  
diligence in  
execution  
of trust.

**SEC. 2259.** A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust.

N. Y. C. C., Sec. 1197.

Duty of trustee  
as to  
appointment  
of successor.

**SEC. 2260.** If a trustee procures or assents to his discharge from his office, before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

This provision is new, and is intended to protect beneficiaries from a hasty resort to the Courts in order to shake off the responsibility of a trust; a proceeding by which they have been sometimes irremediably injured; an insolvent and reckless trustee having been appointed in place of an indolent but responsible one.

N. Y. C. C., Sec. 1198.

Investment  
of money by  
trustee.

**SEC. 2261.** A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

N. Y. C. C., Sec. 1199.

SEC. 2262. If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful.

Interest,  
simple or  
compound,  
or omission  
to invest  
trust moneys

N. Y. C. C., Sec. 1200.

SEC. 2263. A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent Court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.

Purchase  
by trustee  
of claims  
against trust  
fund.

N. Y. C. C., Sec. 1201.

### ARTICLE III

#### POWERS OF TRUSTEES.

SECTION 2267. Trustee's powers as agent.

2268. All must act.

2269. Discretionary powers.

SEC. 2267. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal.

Trustee's  
powers as  
agent.

N. Y. C. C., Sec. 1202.

SEC. 2268. Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides.

All must act.

N. Y. C. C., Sec. 1203.

SEC. 2269. A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper Court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.

Discretion-  
ary powers.

N. Y. C. C., Sec. 1204.

## ARTICLE IV.

## RIGHTS OF TRUSTEES.

SECTION 2273. Indemnification of trustee.

2274. Compensation of trustee.

2275. Involuntary trustee.

Indemnifica-  
tion of trust-  
ee.

SEC. 2273. A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate.

N. Y. C. C., Sec. 1205.

Compensa-  
tion of trust-  
ee.

SEC. 2274. When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified, and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances.

N. Y. C. C., Sec. 1206.

Involuntary  
trustee.

SEC. 2275. An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article.

N. Y. C. C., Sec. 1207.

## ARTICLE V.

## TERMINATION OF THE TRUST.

SECTION 2279. Trust, how extinguished.

2280. Not revocable.

2281. Trustee's office, how vacated.

2282. Trustee, how discharged.

2283. Removal by District Court.

Trust, how  
extinguished

SEC. 2279. A trust is extinguished by the entire fulfilment of its object, or by such object becoming impossible or unlawful.

N. Y. C. C., Sec. 1208.

Not revoca-  
ble.

SEC. 2280. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee



and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

N. Y. C. C., Sec. 1209.

Sec. 2281. The office of a trustee is vacated—

1. By his death; or,
2. By his discharge.

Trustee's  
office, how  
vacated.

N. Y. C. C., Sec. 1210.

Sec. 2282. A trustee can be discharged from his trust only as follows :

Trustee, how  
discharged.

1. By the extinction of the trust.
2. By the completion of his duties under the trust.
3. By such means as may be prescribed by the declaration of trust.
4. By the consent of the beneficiary, if he has capacity to contract.
5. By the judgment of a competent tribunal, in a direct proceeding for that purpose, that he is of unsound mind, or,
6. By the District Court.

N. Y. C. C., Sec. 1211.

Sec. 2283. The District Court may remove any trustee who has violated or is unfit to execute the trust.

Removal by  
District  
Court.

N. Y. C. C., Sec. 1212.

## ARTICLE VI.

### SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

Section 2287. Vacant trusteeship filled by Court.

2288. Survivorship between co-trustees.

2289. District Court as trustee.

Sec. 2287. The District Court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practicable method of appointment.

Vacant trust-  
eeship filled  
by Court.

N. Y. C. C., Sec. 1213.

Sec. 2288. On the death, renunciation or discharge of one of several co-trustees, the trust survives to the others.

Survivorship  
between co-  
trustees.

Lewin on Trustees, 299 ; Belmont vs. O'Brien. 12 N. Y., 394. Matter of Van Schoonhoven, 5 Paige, 559 ; De Peyster vs. Clendining, 8 id., 295. Matter of Crossman, 20 How. Pr., 350.

N. Y. C. C., Sec. 1214.

District  
Court as  
trustee.

SEC. 2289. When a trust exists without any appointed trustee, or where all the trustees renounce, die or are discharged, the District Court of the county where the trust property, or some portion thereof is situated, must appoint another trustee and direct the execution of the trust.

N. Y. C. C., Sec. 1215 ; Stats. 1867, 170.

## TITLE IX.

### AGENCY.

#### CHAPTER I. AGENCY IN GENERAL.

##### II. PARTICULAR AGENCIES.

NOTE.—Under this head, the representation of one person by another is the only subject treated. The rights acquired by third persons against both the principal and the agent are here stated. The mutual relations of principal and agent are a branch of *Service*, and are defined in the Title on that subject. So far as these relations create a mutual trust, they are regulated by the Title on *Trust*.

### CHAPTER I.

#### AGENCY IN GENERAL.

##### ARTICLE I. DEFINITION OF AGENCY.

##### II. AUTHORITY OF AGENTS.

##### III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

##### IV. OBLIGATIONS OF AGENTS TO THIRD PERSONS.

##### V. DELEGATION OF AGENCY.

##### VI. TERMINATION OF AGENCY.

#### ARTICLE I.

##### DEFINITION OF AGENCY.

SECTION 2295. Agency, what.

2296. Who may appoint and who may be an agent.

2297. Agents, general or special.

**SECTION 2298.** Agency, actual or ostensible.

2299. Actual agency.

2300. Ostensible agency.

**SEC. 2295.** An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency. Agency,  
what.

N. Y. C. C., Sec. 1216.

**SEC. 2296.** Any person, having capacity to contract, may appoint an agent; and any person may be an agent. Who may  
appoint and  
who may be  
an agent.

N. Y. C. C., Sec. 1217.

**SEC. 2297.** An agent for a particular act or transaction is called a special agent. All others are general agents. Agents,  
general or  
special.

N. Y. C. C., Sec. 1218.

**SEC. 2298.** An agency is either actual or ostensible. Agency,  
actual or  
ostensible.

N. Y. C. C., Sec. 1219.

**SEC. 2299.** An agency is actual when the agent is really employed by the principal. Actual  
agency.

N. Y. C. C., Sec. 1220.

**SEC. 2300.** An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Ostensible  
agency.

N. Y. C. C., Sec. 1221.

## ARTICLE II.

### AUTHORITY OF AGENTS.

**SECTION 2304.** What authority may be conferred.

2305. Agent may perform acts required of principal by Code.

2306. Agent cannot have authority to defraud principal.

2307. Creation of agency.

2308. Consideration unnecessary.

2309. Form of authority.

2310. Ratification of agent's act.

2311. Ratification of part of a transaction.

2312. When ratification void.

2313. Ratification not to work injury to third persons.

2314. Rescission of ratification.

2315. Measure of agent's authority.

2316. Actual authority, what.

2317. Ostensible authority, what.

**SECTION 2318.** Agent's authority as to persons having notice of restrictions upon it.

**2319.** Agent's necessary authority.

**2320.** Agent's power to disobey instructions.

**2321.** Authority to be construed by its specific, rather than by its general terms.

**2322.** Exceptions to general authority.

**2323.** What included in authority to sell personal property.

**2324.** What included in authority to sell real property.

**2325.** Authority of general agent to receive price of property.

**2326.** Authority of special agent to receive price.

What authority may be conferred

**SEC. 2304.** An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention.

N. Y. C. C., Sec. 1222.

Agent may perform acts required of principal by Code

**SEC. 2305.** Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

N. Y. C. C., Sec. 1223.

Agent cannot have authority to defraud principal.

**SEC. 2306.** An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal.

N. Y. C. C., Sec. 1224.

Creation of agency.

**SEC. 2307.** An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.

N. Y. C. C., Sec. 1225.

Consideration unnecessary.

**SEC. 2308.** A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

N. Y. C. C., Sec. 1226.

Form of authority.

**SEC. 2309.** An oral authorization is sufficient for any purpose, except that an authority to enter into a contract [required by law to be in writing] can only be given by an instrument [in writing].

N. Y. C. C., Sec. 1227.

**NOTE.**—The words "under seal" and "under seal," struck out of Sec. 1227 (N. Y. C. C.), and those in brackets inserted, and the second subdivision omitted, as included in this section.

**Sec. 2310.** A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.

Ratification  
of agent's  
act.

N. Y. C. C., Sec. 1228.

**Sec. 2311.** Ratification of part of an indivisible transaction is a ratification of the whole.

Ratification  
of part of a  
transaction.

N. Y. C. C., Sec. 1229.

**Sec. 2312.** A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.

When ratifi-  
cation void.

*M'Cracken vs. San Francisco*, 16 Cal., 591.

N. Y. C. C., Sec. 1230.

**Sec. 2313.** No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent.

Ratification  
not to work  
injury to  
third per-  
sons.

This is, perhaps, a broader rule than at present exists. But great difficulty has been felt in attempting to reconcile the cases (see *Story Ag.*, Secs. 246, 247; *Bliss vs. Cottle*, 32 Barb., 322; *Bird vs. Brown*, 4 Exch., 786; *Wilson vs. Tumman*, 6 M. & G., 236; *Palmer vs. Stephens*, 1 Denio, 481; *Rossiter vs. Rossiter*, 8 Wend., 499). In *Buron vs. Denman* (2 Exch., 167), the defendant had committed a trespass, which the English Government expressly ratified. This was held to relieve the defendant from responsibility. In *Lucas vs. Wilkinson* (1 H. & N., 420), it was held that an act expressly done on behalf of A could not be ratified and adopted by B, to the prejudice of C.

N. Y. C. C., Sec. 1231.

**Sec. 2314.** A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

Rescission of  
ratification.

N. Y. C. C., Sec. 1232.

**Sec. 2315.** An agent has such authority as the principal, actually or ostensibly, confers upon him.

Measure  
of agent's  
authority.

N. Y. C. C., Sec. 1233.

**Sec. 2316.** Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

Actual au-  
thority, what

N. Y. C. C., Sec. 1234.

Ostensible  
authority,  
what.

**SEC. 2317.** Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

N. Y. C. C., Sec. 1235.

Agent's au-  
thority as to  
persons hav-  
ing notice  
of restric-  
tions upon it.

**SEC. 2318.** Every agent has actually such authority as is defined by this Title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

N. Y. C. C., Sec. 1236.

Agent's  
necessary  
authority.

**SEC. 2319.** An agent has authority—

1. To do everything necessary, or proper and usual in the ordinary course of business, for effecting the purpose of his agency ; and,

2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made

N. Y. C. C., Sec. 1237.

Agent's  
power to  
disobey in-  
structions.

**SEC. 2320.** An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

N. Y. C. C., Sec. 1238.

Authority to  
be construed  
by its spe-  
cific, rather  
than by its  
general  
terms.

**SEC. 2321.** When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

N. Y. C. C., Sec. 1239.

Exceptions  
to general  
authority.

**SEC. 2322.** An authority expressed in general terms, however broad, does not authorize an agent—

1. To act in his own name, unless it is the usual course of business to do so.

2. To define the scope of his agency ; or,

3. To do any act which a trustee is forbidden to do by Art. II, of Chap. I, of the last Title.

N. Y. C. C., Sec. 1240.

**Sec. 2323.** An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

What included in authority to sell personal property.

N. Y. C. C., Sec. 1241.

**Sec. 2324.** An authority to sell and convey real property includes authority to give the usual covenants of warranty [or the Code Covenants].

What included in authority to sell real property.

N. Y. C. C., Sec. 1242.

**Sec. 2325.** A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price.

Authority of general agent to receive price of property.

N. Y. C. C., Sec. 1243.

**Sec. 2326.** A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards.

Authority of special agent to receive price.

N. Y. C. C., Sec. 1244.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

**Section 2330.** Principal, how affected by acts of agent within the scope of his authority.

2331. Principal, when bound by incomplete execution of authority.

2332. Notice to agent, when notice to principal.

2333. Obligation of principal when agent exceeds his authority.

2334. For acts done under a merely ostensible authority.

2335. When exclusive credit is given to agent.

2336. Rights of person who deals with agent without knowledge of his agency.

2337. Principal's responsibility for agent's negligence or omission.

2338. Principal's responsibility for wrongs wilfully committed by the agent.

**Sec. 2330.** An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

Principal, how affected by acts of agent within the scope of his authority

N. Y. C. C., Sec. 1245.

Principal,  
when bound  
by incom-  
plete execu-  
tion of au-  
thority.

SEC. 2331. A principal is bound by an incomplete execution of an authority, when it is consistent with the whole purpose and scope thereof, but not otherwise.

N. Y. C. C., Sec. 1246.

Notice to  
agent, when  
notice to  
principal.

SEC. 2332. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

N. Y. C. C., Sec. 1247.

Obligation  
of principal  
when agent  
exceeds his  
authority.

SEC. 2333. When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

N. Y. C. C., Sec. 1248.

For acts  
done under  
a merely  
ostensible  
authority.

SEC. 2334. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof.

N. Y. C. C., Sec. 1249.

When exclu-  
sive credit  
is given to  
agent.

SEC. 2335. If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible.

N. Y. C. C., Sec. 1250.

Rights of  
person who  
deals with  
agent with-  
out knowl-  
edge of his  
agency.

SEC. 2336. One who deals with an agent, without knowing or having reason to believe that the agent acts as such in the transaction, may set off, against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.

N. Y. C. C., Sec. 1251.

NOTE.—The following is Sec. 1252 (and note) of the New York Civil Code:

SEC. 1252. Any instrument within the scope of his authority, whether under seal or not, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.

This section belongs, perhaps, to the general subject of interpretation of contracts. It is intended to abolish the distinction in this respect between sealed and unsealed instruments. See Story Ag., Secs. 147-155.



This Commission has taken a more direct way to abolish the distinction between sealed and unsealed instruments. See Sec. 1096.

SEC. 2337. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in, and as a part of, the transaction of such business, and for his wilful omission to fulfil the obligations of the principal.

Principal's responsibility for agent's negligence or omission.

N. Y. C. C., Sec. 1253.

SEC. 2338. A principal is responsible for no other wrongs committed by his agent, than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

Principal's responsibility for wrongs wilfully committed by the agent.

N. Y. C. C., Sec. 1254.

#### ARTICLE IV.

##### OBLIGATIONS OF AGENTS TO THIRD PERSONS.

SECTION 2342. Warranty of authority.

2343. Agent's responsibility to third persons.

2344. Obligation of agent to surrender property to third person.

2345. Agent not having capacity to contract.

SEC. 2342. One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes.

Warranty of authority.

N. Y. C. C., Sec. 1255.

SEC. 2343. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

Agent's responsibility to third persons.

1. When, with his consent, credit is given to him personally in a transaction.

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature.

N. Y. C. C., Sec. 1256.

Obligation  
of agent to  
surrender  
property to  
third person.

**Sec. 2344.** If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal.

N. Y. C. C., Sec. 1257.

Agent not  
having ca-  
pacity to  
contract.

**Sec. 2345.** The provisions of this article are subject to the provisions of Part I, Div. First, of this Code.

N. Y. C. C., Sec. 1258.

## ARTICLE V.

### DELEGATION OF AGENCY.

**SECTION 2349.** Agent's delegation of his powers.

2350. Agent's unauthorized employment of sub-agent.

2351. Sub-agent rightfully appointed, represents principal.

Agent's del-  
egation of  
his powers.

**Sec. 2349.** An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical.
2. When it is such as the agent cannot himself, and the sub-agent can, lawfully perform.
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal.

N. Y. C. C., Sec. 1259.

Agent's un-  
authorized  
employment  
of sub-agent.

**Sec. 2350.** If an agent employs a sub-agent without authority, the former is a principal, and the latter his agent, and the principal of the former has no connection with the latter.

N. Y. C. C., Sec. 1260.

Sub-agent  
rightfully  
appointed,  
represents  
principal.

**Sec. 2351.** A sub-agent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the sub-agent.

N. Y. C. C., Sec. 1261.

## ARTICLE VI.

## TERMINATION OF AGENCY.

SECTION 2355. Termination of agency.

2356. Same.

SEC. 2355. An agency is terminated, as to every person having notice thereof, by— Termination of agency.

1. The expiration of its term.
2. The extinction of its subject.
3. The death of the agent.
4. His renunciation of the agency ; or,
5. His incapacity of the agent to act as such.

N. Y. C. C., Sec. 1262.

SEC. 2356. Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by— Same.

1. Its revocation by the principal.
2. His death ; or,
3. His incapacity to contract.

N. Y. C. C., Sec. 1263.

## CHAPTER II.

## PARTICULAR AGENCIES.

ARTICLE I. AUCTIONEERS.

II. FACTORS.

III. SHIPMASTERS AND PILOTS.

IV. SHIPS' MANAGERS.

## ARTICLE I.

## AUCTIONEERS.

SECTION 2362. Auctioneer's authority from the seller.

2363. Auctioneer's authority from the bidder.

SEC. 2362. An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller, only as follows : Auctioneer's authority from the seller.

1. To sell by public auction to the highest bidder.
2. To sell for cash only, except such articles as are usually sold on credit at auction.

3. To warrant, in like manner with other agents to sell, according to Sec. 2323.

4. To prescribe reasonable rules and terms of sale.

5. To deliver the thing sold, upon payment of the price.

6. To collect the price; and,

7. To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

N. Y. C. C., Sec. 1264.

Auctioneer's  
authority  
from the  
bidder.

SEC. 2363. An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract, as prescribed in the Title on *Sale*.

N. Y. C. C., Sec. 1265.

NOTE.—See Sec. 1798.

## ARTICLE II.

### FACTORS.

SECTION 2367. Factor, what.

2368. Actual authority of factor.

2369. Ostensible authority.

Factor, what.

SEC. 2367. A factor is an agent, as defined by Sec. 2026:

N. Y. C. C., Sec. 1266.

Actual  
authority  
of factor.

SEC. 2368. In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted—

1. To insure property consigned to him uninsured.

2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage or barter the same; and,

3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

N. Y. C. C., Sec. 1267.

Ostensible  
authority.

SEC. 2369. A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

N. Y. C. C., Sec. 1268.

## ARTICLE III.

## SHIPMASTERS AND PILOTS.

**SECTION 2373.** Authority of shipmaster on behalf of shipowner.

**2374.** Authority to borrow.

**2375.** Authority on behalf of owners of cargo.

**2376.** Power to make contracts.

**2377.** Power to hypothecate.

**2378.** Master's power to sell ship.

**2379.** Master's power to sell cargo.

**2380.** Authority to ransom ship.

**2381.** Abandonment terminates master's power.

**2382.** Personal liability for contracts concerning the ship.

**2383.** Liability for acts of persons employed upon the ship.

**2384.** Responsibility for negligence of pilot.

**SEC. 2373.** The master of a ship is a general agent for its owner, in all matters concerning the same.

Authority of  
shipmaster  
on behalf of  
shipowner.

N. Y. C. C., Sec. 1269.

**SEC. 2374.** The master of a ship has authority to borrow money on the credit of its owner, if it is necessary to enable him to complete the voyage, and if neither the owner nor his proper agent for such matters can be consulted without injurious delay.

Authority  
to borrow.

N. Y. C. C., Sec. 1270.

**SEC. 2375.** The master of a ship, during a voyage, is a general agent for each of the owners of the cargo, and has authority to do whatever they might do for the preservation of their respective interests, except to sell or hypothecate the same.

Authority  
on behalf  
of owners  
of cargo.

N. Y. C. C., Sec. 1271.

**SEC. 2376.** The master of a ship may procure all its necessary repairs and supplies, may engage cargo and passengers for carriage, and, in a foreign port, may enter into a charter party; and his contracts for these purposes bind the owner to the full amount of the value of the ship and freightage.

Power to  
make con-  
tracts.

N. Y. C. C., Sec. 1272.

**SEC. 2377.** The master of a ship may hypothecate the ship, freightage and cargo, in the cases prescribed by the chapters on *Bottomry* and *Respondentia*, and in no others.

Power to  
hypothecate.

There seems to be no precedent or usage which would justify any other form of hypothecation by a master.

N. Y. C. C., Sec. 1273.

Master's  
power to sell  
ship.

SEC. 2378. When a ship, whether foreign or domestic, is seriously injured, or the voyage is otherwise broken up, beyond the possibility of pursuing it, the master, in case of necessity, may sell the ship without instructions from the owners, unless by the earliest use of ordinary means of communication he can inform the owners, and await their instructions.

N. Y. C. C., Sec. 1274.

Master's  
power to sell  
cargo.

SEC. 2379. The master of a ship may sell the cargo, if the voyage is broken up beyond the possibility of pursuing it, and no other ship can be obtained to carry it to its destination, and the sale is otherwise absolutely necessary.

N. Y. C. C., Sec. 1275.

Authority to  
ransom ship.

SEC. 2380. The master of a ship, in case of its capture, may engage to pay a ransom for it, in money or in part of the cargo, and his engagement will bind the ship, freightage and cargo.

N. Y. C. C., Sec. 1276.

Abandon-  
ment termi-  
nates mas-  
ter's power.

SEC. 2381. The power of the master of a ship to bind its owner, or the owners of the cargo, ceases upon the abandonment of the ship and freightage to insurers.

N. Y. C. C., Sec. 1277.

Personal lia-  
bility for  
contracts  
concerning  
the ship.

SEC. 2382. Unless otherwise expressly agreed, or unless the contracting parties give exclusive credit to the owner, the master of a ship is personally liable upon his contracts relative thereto, even when the owner is also liable.

N. Y. C. C., Sec. 1278.

Liability for  
acts of per-  
sons em-  
ployed upon  
the ship.

SEC. 2383. The master of a ship is liable to third persons for the acts or negligence of persons employed in its navigation, whether appointed by him or not, to the same extent as the owner of the ship.

N. Y. C. C., Sec. 1279.

Responsibili-  
ty for negli-  
gence of  
pilot.

SEC. 2384. The owner or master of a ship is not responsible for the negligence of a pilot whom he is bound by law to employ; but if he is allowed an option between pilots, some of whom are competent, or is required only to pay compensation to a pilot, whether he employs him or not, he is so responsible to third persons.

N. Y. C. C., Sec. 1280.

## ARTICLE IV.

## SHIPS' MANAGERS.

SECTION 2388. What powers manager has.

2389. What powers he has not.

SEC. 2388. A ship's manager has power to make contracts requisite for the performance of his duties as such; to enter into charter parties, or make contracts for carriage; and to settle for freightage and adjust averages.

What powers manager has.

N. Y. C. C., Sec. 1281.

SEC. 2389. Without special authority, a ship's manager cannot borrow money, or give up the lien for freightage, or purchase a cargo, or bind the owners of the ship to an insurance.

What powers he has not.

N. Y. C. C., Sec. 1282.

## TITLE X.

## PARTNERSHIP.

## CHAPTER I. PARTNERSHIP IN GENERAL.

## II. GENERAL PARTNERSHIP.

## III. SPECIAL PARTNERSHIP.

## IV. MINING PARTNERSHIP.

## CHAPTER I.

## PARTNERSHIP IN GENERAL.

## ARTICLE I. WHAT CONSTITUTES A PARTNERSHIP.

## II. PARTNERSHIP PROPERTY.

## III. MUTUAL OBLIGATIONS OF PARTNERS.

## IV. RENUNCIATION OF PARTNERSHIP.

## ARTICLE I.

## WHAT CONSTITUTES A PARTNERSHIP.

SECTION 2395. Partnership, what.

2396. Ship owners.

2397. Formation of partnership.

Partnership,  
what.

**SEC. 2395.** Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.

N. Y. C. C., Sec. 1283.

Ship owners.

**SEC. 2396.** Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship.

N. Y. C. C., Sec. 1284.

Formation  
of partner-  
ship.

**SEC. 2397.** A partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof.

N. Y. C. C., Sec. 1285.

## ARTICLE II.

### PARTNERSHIP PROPERTY.

**SECTION 2401.** Partnership property, what.

2402. Partners' interest in partnership property.

2403. Partners share in profits and losses.

2404. When division of losses implied.

2405. Partner may require application of partnership property to payment of debts.

2406. What property is partnership property by presumption.

Partnership  
property,  
what.

**SEC. 2401.** The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby.

Code Napoleon, Art. 1839 ; N. Y. C. C., Sec. 1286 ; accords with Duprey vs. Leavenworth (17 Cal., 362) and Collumb vs. Read (24 N. Y., 505).

Partners in-  
terest in  
partnership  
property.

**SEC. 2402.** The interest of each member of a partnership extends to every portion of its property.

N. Y. C. C., Sec. 1287 ; Blacks. Com., 182 ; Mabbett vs. White, 12 N. Y., 442 ; Story on Partn., Sec. 16.

Partners  
share in  
profits and  
losses.

**SEC. 2403.** In the absence of any agreement on the subject, the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

N. Y. C. C., Sec. 1288.



**Sec. 2404.** An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.

When division of losses implied

N. Y. C. C., Sec. 1289.

**NOTE.**—This settles what has been heretofore a doubtful proposition.

**Sec. 2405.** Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any due to him.

Partner may require application of partnership property to payment of debts.

*Chase vs. Steel*, 9 Cal., 64; *Burpee vs. Bunn*, 22 Cal., 194; *Bullock vs. Hubbard*, 23 Cal., 501; *Duryea vs. Burt*, 28 Cal., 569; N. Y. C. C., Sec. 1290.

**Sec. 2406.** Property, whether real or personal, acquired with partnership funds, is presumed to be partnership property.

What property is partnership property by presumption

N. Y. C. C., Sec. 1291; *Collumb vs. Read*, 29 N. Y., 505; *Duprey vs. Leavenworth*, 17 Cal., 262.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PARTNERS.

**SECTION 2410.** Partners trustees for each other.

2411. Good faith to be observed between them.

2412. Mutual liability of partners to account.

2413. No compensation for services to firm.

**Sec. 2410.** The relations of partners are confidential. They are trustees for each other within the meaning of Chap. I of the Title on *Trusts*, and their obligations as such trustees are defined by that chapter.

Partners trustees for each other.

N. Y. C. C., Sec. 1292.

**Sec. 2411.** In all proceedings connected with the formation, conduct, dissolution and liquidation of a partnership, every partner is bound to act in the highest good faith towards his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

Good faith to be observed between them.

N. Y. C. C., Sec. 1293.

Mutual  
liability of  
partners to  
account.

SEC. 2412. Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf.

N. Y. C. C., Sec. 1294.

No compen-  
sation for  
services to  
firm.

SEC. 2413. A partner is not entitled to any compensation for services rendered by him to the partnership.

N. Y. C. C., Sec. 1295.

NOTE.—An agreement may be made for compensation to be paid a member of the partnership for his services, but without such special agreement he is not entitled to compensation, hence the general rule is as stated in the text.

#### ARTICLE IV.

##### RENUNCIATION OF PARTNERSHIP.

SECTION 2417. Renunciation of future profits exonerates from liability.

2418. Effect of renunciation.

Renuncia-  
tion of future  
profits exon-  
erates from  
liability.

SEC. 2417. A partner may exonerate himself from all future liability to a third person, on account of the partnership, by renouncing, in good faith, all participation in its future profits, and giving notice to such third person, and to his own copartners, that he has made such renunciation; and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future.

N. Y. C. C., Sec. 1296.

Effect of re-  
nunciation.

SEC. 2418. After a partner has given notice of his renunciation of the partnership he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.

N. Y. C. C., Sec. 1297.

## CHAPTER II.

## GENERAL PARTNERSHIP.

## ARTICLE I. WHAT IS A GENERAL PARTNERSHIP.

## II. POWERS AND AUTHORITY OF PARTNERS.

## III. MUTUAL OBLIGATIONS OF PARTNERS.

## IV. LIABILITY OF PARTNERS.

## V. TERMINATION OF PARTNERSHIP.

## VI. LIQUIDATION.

## VII. OF THE USE OF FICTITIOUS NAMES.

## ARTICLE I.

## WHAT IS A GENERAL PARTNERSHIP.

## SECTION 2424. General partnership, what.

SEC. 2424. Every partnership that is not formed in accordance with the law concerning special or mining partnerships, and every special or mining partnership, so far only as the general partners are concerned, is a general partnership.

General  
partnership,  
what.

N. Y. C. C., Sec. 1298.

## ARTICLE II.

## POWERS AND AUTHORITY OF PARTNERS.

## SECTION 2428. Power of majority of partners.

## 2429. Authority of individual partner.

## 2430. What authority partner has not.

## 2431. Partner's acts in bad faith, when ineffectual.

SEC. 2428. Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business.

Power of  
majority  
partners.

N. Y. C. C., Sec. 1299.

SEC. 2429. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

Authority  
individual  
partner.

N. Y. C. C., Sec. 1300.

NOTE.—The authorities cited under this section of the New York Civil Code are ample in support of this rule.

What authority partner has not.

**SEC. 2430.** A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting:

1. To make an assignment of the partnership property, or any portion thereof, to a creditor, or to a third person, in trust for the benefit of a creditor or of all creditors.

2. To dispose of the good will of the business.

3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise.

4. To do any act which would make it impossible to carry on the ordinary business of the partnership; or,

5. To do any other act not within the scope of the preceding section.

N. Y. C. C., Sec. 1301.

NOTE.—See note to Sec. 1301 (N. Y. C. C.) for authorities.

Partner's acts in bad faith, when ineffectual.

**SEC. 2431.** A partner is not bound by any act of a copartner, in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act.

N. Y. C. C., Sec. 1302.

NOTE.—If a choice must be made which of two parties must suffer by the bad faith of a person, that one who, by association with, indorses him, ought to suffer.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PARTNERS.

**SECTION 2435.** Profits of individual partner.

2436. In what business partner may not engage.

2437. In what he may engage.

2438. Must account to firm for profits.

Profits of individual partner.

**SEC. 2435.** All profits made by a general partner, in the course of any business usually carried on by the partnership, belong to the firm.

N. Y. C. C., Sec. 1303.

In what business partner may not engage.

**SEC. 2436.** A general partner who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an in-

terest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

N. Y. C. C., Sec. 1304.

Sec. 2437. A partner may engage in any separate business, except as otherwise provided by the last two sections. In what he may engage.

N. Y. C. C., Sec. 1305.

Sec. 2438. A general partner transacting business contrary to the provisions of this article may be required by any copartner to account to the partnership for the profits of such business. Must account to firm for profits.

N. Y. C. C., Sec. 1306.

#### ARTICLE IV.

##### LIABILITY OF PARTNERS.

Section 2442. Liability of partners to third persons.

2443. Liability for each other's acts as agents.

2444. Liability of one held out as partner.

2445. No one liable as partner unless held out as such.

Sec. 2442. Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners. Liability of partners to third persons

N. Y. C. C., Sec. 1307.

Sec. 2443. The liability of general partners for each other's acts is defined by the Title on *Agency*. Liability for each other's acts as agents.

N. Y. C. C., Sec. 1308.

Sec. 2444. Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership. Liability of one held out as partner.

N. Y. C. C., Sec. 1309.

Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section. No one liable as partner unless held out as such.

N. Y. C. C., Sec. 1310.

NOTE.—See note to this section in the New York Civil Code.

## ARTICLE V.

## TERMINATION OF PARTNERSHIP.

SECTION 2449. Duration of partnership.

2450. Total dissolution of partnership.

2451. Partial dissolution.

2452. Partner entitled to dissolution.

2453. Notice of termination.

2454. Notice by change of name.

Duration of  
partnership.

SEC. 2449. If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.

N. Y. C. C., Sec. 1311.

Total disso-  
lution of  
partnership.

SEC. 2450. A general partnership is dissolved, as to all the partners—

1. By lapse of the time prescribed by agreement for its duration.

2. By the expressed will of any partner, if there is no such agreement.

3. By the death of a partner.

4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property.

5. By war, or the prohibition of commercial intercourse between the country in which one partner resides, and that in which another resides ; or,

6. By a judgment of dissolution.

N. Y. C. C., Sec. 1312.

Partial  
dissolution.

SEC. 2451. A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject however to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution.

N. Y. C. C., Sec. 1313.

Partner  
entitled to  
dissolution.

SEC. 2452. A general partner is entitled to a judgment of dissolution—

1. When he, or another partner, becomes legally incapable of contracting.

2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct ; or,

## CIVIL CODE.

business of the partnership can be carried on without loss.

C. C., Sec. 1314.

Liability of a general partner for the debts of the partnership continues, even after a dissolution, in favor of persons who have been given credit to the partnership during the time they have had personal notice of the dissolution, in favor of other persons until such notice is advertised in a newspaper published at the place of business, at the time of the dissolution, to the extent in either case to which the partner has value in good faith, and in the case of a partner who is still a member of the firm.

C. C., Sec. 1315.

A change of the partnership name, which is the withdrawal of a partner, is sufficient notice of such withdrawal to all persons who have been given credit; but a change in the name without such an indication, is not notice to any partner.

C. C., Sec. 1316.

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## ARTICLE VI.

### LIQUIDATION.

Partners may act after dissolution.

Partners may not act in liquidation.

Partners may not act in liquidation.

Partners may act in liquidation.

Partners may do in liquidation.

After the dissolution of a partnership, the majority of the partners are such only as provided in this article.

C. C., Sec. 1317.

A member of a general partnership may not act in its affairs, except as provided by this article.

C. C., Sec. 1318.

Who may  
not act in  
liquidation.

SEC. 2460. If the liquidation of a partnership is committed, by consent of all the partners, to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value, in good faith, upon credit thereof.

N. Y. C. C., Sec. 1319.

Powers of  
partners in  
liquidation.

SEC. 2461. A partner authorized to act in liquidation may collect, compromise or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property.

N. Y. C. C., Sec. 1320.

What part-  
ner may do  
in liquida-  
tion.

SEC. 2462. A partner authorized to act in liquidation may enter, in the name of the firm, into any obligation, by way of satisfaction of a partnership debt, or as a collateral security therefor; but he cannot make, draw or indorse any other obligation in its name, nor revive a debt against the firm, by any acknowledgment or part payment, within the provisions of the CODE OF CIVIL PROCEDURE concerning the times of commencing civil actions.

N. Y. C. C., Sec. 1321.

## ARTICLE VII.

### OF THE USE OF FICTITIOUS NAMES.

SECTION 2466. Fictitious name.

2467. Style of foreign partnership.

2468. Continuation of style of firm having foreign business relations.

2469. Certificates stating names, etc., what to contain, and to be filed and published.

2470. Register of such firms to be kept by County Clerk.

2471. Certified copies of register, and proof of publication, to be evidence.

Fictitious  
name.

SEC. 2466. No partnership or person may transact business by a fictitious name, or in the name of a person not interested in such business, except as prescribed in this article.

N. Y. C. C., Sec. 1322.

Style of  
foreign  
partnership.

SEC. 2467. A commercial partnership, established and transacting business in a place without the United States,



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may use in this State the partnership name there, although fictitious.

N. Y. C. C., Sec. 1323.

Sec. 2468. The name of a partnership, wh business relations with places without the Un may be continued in use by the persons succe business, and by their successors, upon comp the provisions of this article, and with the col persons, if living, whose names are used.

N. Y. C. C., Sec. 1324.

Sec. 2469. On every change of the persc ing the use of a partnership name, under the the person acquiring the right to use it mu acknowledge before a proper officer for tha certificate, stating the name of each person der such name, and his place of residence, as the same with the Clerk of the county in principal place of business is situated, and m such certificate, or a statement containing th thereof, once in each week for four successive ginning within one week after his first using in a newspaper printed in the county, or county (if none is printed in the county), in principal place of business is situated.

N. Y. C. C., Sec. 1325.

Sec. 2470. Every County Clerk must keep of the names of firms and persons mentioned tificates filed with him, pursuant to the last se ing in alphabetical order the name of every s ship and of each partner therein.

N. Y. C. C., Sec. 1326.

Sec. 2471. Copies of the entries of a Coun herein directed, when certified by him, and publication, as herein directed, made by the p lisher or chief clerk of a newspaper, are pres dence of the facts therein stated.

N. Y. C. C., Sec. 1327.

## CHAPTER III.

## SPECIAL PARTNERSHIP.

- ARTICLE I. FORMATION OF PARTNERSHIP. -  
 II. POWERS, RIGHTS AND DUTIES OF THE PARTNERS.  
 III. LIABILITY OF PARTNERS.  
 IV. ALTERATION AND DISSOLUTION OF THE PARTNERSHIP.

## ARTICLE I.

## FORMATION OF PARTNERSHIP.

- SECTION 2477. Formation of special partnership.  
 2478. Of what to consist.  
 2479. Certified statement.  
 2480. Acknowledged and recorded. False statement.  
 2481. Affidavit as to sums contributed.  
 2482. No partnership until compliance.  
 2483. Certificate to be published.  
 2484. Affidavit of publication filed.  
 2485. Renewal of special partnership.

Formation  
of special  
partnership.

SEC. 2477. A special partnership may be formed by two or more persons, in the manner and with the effect prescribed in this chapter, for the transaction of any business except banking or insurance.

Stats. 1870, 123, Sec. 1.

Of what to  
consist.

SEC. 2478. A special partnership may consist of one or more persons called general partners, and one or more persons called special partners.

Stats. 1870, 123, Sec. 2.

Certified  
statement.

SEC. 2479. Persons desirous of forming a special partnership must severally sign a certificate, stating—

1. The name under which the partnership is to be conducted.

2. The general nature of the business intended to be transacted.

3. The names of all the partners, and their residences, specifying which are general and which are special partners.

4. The amount of capital which each special partner has contributed to the common stock.

at which such partnership will begin

Acts. 1870, 123, Sec. 3.

Certificates under the last section must be signed by all the partners, before some officer who makes acknowledgment of deeds, one to the Clerk's office and the other recorded with the Recorder of the county in which the place of business of the partnership is situated. It shall be kept for that purpose, open to public inspection. If the partnership has places of business in different counties, a copy of the certificate, duly signed, shall be recorded in the Recorder in whose office it is recorded, and in the Clerk's office, and recorded, in like manner in the Recorder in every such county. If any false statement is made in any such certificate, all persons interested in the partnership are liable, as partners, for all the engagements thereof.

Acknowledged and recorded.

False statement.

Acts. 1870, 123, Sec. 4.

An affidavit of each of the partners, stating the amount specified in the certificate of the partnership has been contributed by each of the special partners, and has been actually and in good faith paid, in money of the United States, must be filed in the county with the original certificate.

Affidavit as to sums contributed.

Acts. 1870, 123, Sec. 5.

No special partnership is formed until the provisions of the last five sections are complied with.

No partnership until compliance.

Acts. 1870, 123, Sec. 6.

The certificate mentioned in this article, or a copy of its substance, must be published in a newspaper published in the county where the original certificate is filed, or in a newspaper where the original certificate is deposited, or in a newspaper published in the State, nearest thereto. Such publication shall be made once a week for four successive weeks, beginning one week from the time of filing the certificate. If such publication is not so made, the partnership shall not be deemed general.

Certificate to be published

Acts. 1870, 123, Sec. 7.

An affidavit of the making of the publication required in the preceding section, made by the

Affidavit of publication filed.

printer, publisher, or chief clerk of the newspaper in which such publication is made, may be filed with the County Recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated.

Stats. 1870, 124, Sec. 8.

Renewal of  
special  
partnership.

Sec. 2485. Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation.

Stats. 1870, 124, Sec. 9.

## ARTICLE II.

### POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

SECTION 2489. Who to do business.

2490. Special partners may advise.

2491. May loan money. Insolvency.

2492. General partners may sue and be sued.

2493. Withdrawal of capital.

2494. Interest and profits.

2495. Result of withdrawing capital.

2496. Preferential transfer void.

Who to do  
business.

Sec. 2489. The general partners only have authority to transact the business of a special partnership.

Stats. 1870, 124, Sec. 10.

Special part-  
ners may  
advise.

Sec. 2490. A special partner may at all times investigate the partnership affairs, and advise his partners, or their agents, as to their management.

Stats. 1870, 124, Sec. 11.

May loan  
money.

Sec. 2491. A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but, in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.

Insolvency.

Stats. 1870, 124, Sec. 12.

General  
partners  
may sue and  
be sued.

Sec. 2492. In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners.

Stats. 1870, 124, Sec. 13.

special partner, under any pretence, part of the capital invested by him in ring its continuance.

Withdrawal  
of capital.

1870, 124, Sec. 14.

pecial partner may receive such lawful proportion of profits as may be agreed ut of the capital invested in the part- by some other special partner, and is d the same to meet subsequent losses.

Interest and  
profits.

1870, 124, Sec. 15.

pecial partner withdraws capital from to the provisions of this article, he general partner.

Result of  
withdrawing  
capital.

1870, 124, Sec. 16.

y transfer of the property of a special a partner therein, made after, or in he insolvency of such partnership or it to give a preference to any creditor p or partner over any other creditor p, is void against the creditors thereof; nt confessed, lien created or security er and with the like intent, is in like

Preferential  
transfer void

1870, 124, Sec. 17.

### ARTICLE III.

#### LIABILITY OF PARTNERS.

r of partners.

al partners.

r for unintentional act.

y question existence of special partnership.

general partners in a special partner- ie same extent as partners in a general

Liability of  
partners.

1870, 124, Sec. 18.

contribution of a special partner to irm, and the increase thereof, is liable e is not otherwise liable therefor, ex-

Of special  
partners.

1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable, as a general partner, to all creditors of the firm.

2. If he has wilfully interfered with the business of the firm, except as permitted in Art. II of this chapter, he is liable in like manner; or,

3. If he has wilfully joined in, or assented to, an act contrary to any of the provisions of Art. II. of this chapter, he is liable in like manner.

Stats. 1870, 124, Sec. 19.

Liability for unintentional act.

SEC. 2502. When a special partner has unintentionally done any of the acts mentioned in the last section he is liable, as a general partner, to any creditor of the firm who has been actually misled thereby to his prejudice.

Stats. 1870, 125, Sec. 20.

Who may question existence of special partnership.

SEC. 2503. One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by Art. I of this chapter.

Stats. 1870, 125, Sec. 21.

#### ARTICLE IV.

##### ALTERATION AND DISSOLUTION.

SECTION 2507. When special partnership becomes general.

2508. How new special partners may be admitted.

2509. Dissolution of special partnerships. Notice.

2510. The name of a special partner not used, unless.

When special partnership becomes general.

SEC. 2507. A special partnership becomes general if, within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate

erified and signed by one or more of  
 filed with the County Clerk and Re-  
 the original certificate of the partner-  
 notice thereof published as is provided  
 after for the publication of the certifi-

1870, 125, Sec. 22.

special partners may be admitted into  
 p upon a certificate, stating the names,  
 tributions to the common stock of  
 ers, signed by each of them, and by  
 e, verified, acknowledged or proved,  
 visions of Art. I of this chapter, and  
 nty Clerk and Recorder with whom  
 ate of the partnership was filed.

How new  
 special part-  
 ners may be  
 admitted.

1870, 125, Sec. 23.

cial partnership is subject to dissolu-  
 nner as a general partnership, except  
 by the act of the partners, is com-  
 hereof has been filed and recorded in  
 nty Clerk and Recorder with whom  
 ate was recorded, and published once  
 ur successive weeks, in a newspaper  
 ity where the partnership has a place

Dissolution  
 of special  
 partnerships

Notice

1870, 125, Sec. 24.

ame of a special partner must not be  
 ie of partnership, unless it be accom-  
 d "Limited."

The name  
 of a special  
 partner not  
 used, unless.

1870, 125, Sec. 25.

-This entire chapter was adopted in 1870, by our  
 re, from the New York Civil Code, vol. 2, Tit. X,  
 to 404, and has only been changed in language  
 ed into articles.

## CHAPTER IV.

### NING PARTNERSHIPS.

luing partnerships formed as other special partner-  
 Additional statement in certificate.

**SECTION 2517.** Meeting to levy assessments, how called and how proved to be valid.

**2518.** How notices shall be served and proof thereof made.

**2519.** Assessment, what and how levied. When to be paid, and shares, how forfeited and to whom.

**2520.** How, on what notice, and by whom sales to be made. Deed made and what it is proof of.

**2521.** Assessments not to exceed certain amount. Additional assessment, when and how levied.

Special mining partnerships formed as other special partnerships.

Additional statement in certificate.

**SEC. 2516.** All special partnerships, formed for the purpose of mining within this State, must comply with all the provisions of Art. I, Chap. II, of this Title, in the formation of such copartnerships; when so formed such special partnerships have all the powers and rights conferred, and are subject to all the duties and liabilities imposed by this Title. The certificate must, in addition to the requirements of Art. I, Chap. III, of this Title, contain the name and location of the mine or mines proposed to be worked or prospected.

[New section.]

Meeting to levy assessments, how called and how proved to be valid.

**SEC. 2517.** Any member of a mining partnership may notify the other members thereof of his purpose to have levied against all the owners, an assessment wherewith to prospect, develop or work their mine, designating in the notice a time and a place, within the county where the mine is situate, for a meeting to be held therefor. Five days previous to the day on which the meeting is to be held, the notice must be served on each partner residing in this State, and on the agent (if any residing in this State) of any partner residing out of the State. Proof of service upon all such partners, whether a majority are present or not, makes the proceedings in levying an assessment had at the meeting of which notice is so given, valid and binding on all the members, and on their shares of the mine.

Stats. 1866, 828, Sec. 2.

How notices shall be served and proof thereof made.

**SEC. 2518.** All notices to members, required under this chapter, must be served as follows :

1. If the party to be served resides in the county where the mine is located, it must be delivered to him personally or left at his place of residence.

2. If the party resides out of the county and within the State, the notice must be sealed in an envelop, addressed



to him at his known or last place of residence, pre-paid and mailed or expressed; service is complete three days after depositing it in the Post-office or express.

3. If the party is out of the State, the notice must be published for eight successive weeks in that newspaper published nearest the mine of the partnership; service is complete on the eighth issue of the paper containing the notice. Proof of service must be made by affidavit to the truth of the return, specifying the acts constituting service by the person serving, mailing or publishing it, attached to a copy of the notice, and filed with the member calling the meeting, or the Secretary of the partnership.

Stats. 1866, 829, Sec. 4.

SEC. 2519. At such meeting a majority of the shares present may levy an assessment upon all the owners, proportional to their respective shares or interests in the mine, and fix the time—not less than thirty days—within which the assessment must be paid, either in money or labor; and if not paid within the time specified, the delinquents must be notified of the amount for which they are delinquent, in the same manner as provided in the preceding section. If the member delinquent fails to discharge the assessment, if in money, or commence work, if it is a labor assessment, for ten days after the service of notice is completed, his shares or interest in the mine becomes the property of the partners who are not delinquent, and may be in whole or in part sold to pay the delinquent assessments, with costs of sale.

Assessment,  
what and  
how levied.

When to be  
paid, and  
shares, how  
forfeited and  
to whom.

Stats. 1866, 828-9, Secs. 2, 3, 5.

SEC. 2520. The sales mentioned in the preceding section must be by a Sheriff, Constable, or an auctioneer, at the mining claim, after ten days' previous notice, given by posting notices containing the amount of the delinquent assessment, the shares or interest, and the name of the owner thereof against which it is levied, and the time and place of sale, in three public places within the district where the mine is located. The sale must be at public auction. The person paying the delinquent assessment thereon for the smallest number of shares or feet of the delinquent interest becomes the purchaser. The purchaser must receive, from the auctioneer or officer selling, a deed to the feet or shares sold, conveying the

How, on  
what notice,  
and by  
whom sales  
to be made.

Deed made  
and what it  
is proof of.

absolute title thereof. The deed is prima facie proof that all proceedings in making the sale are regular. .

Stats. 1866, 829-30, Sec. 6.

Assessments  
not to exceed  
certain  
amount.

Additional  
assessments,  
when and  
how levied.

SEC. 2521. When the by-laws of a mining partnership provide what amount of work must be done in the mine, no assessment must be levied exceeding that which may be necessary to pay for the required work, nor must an additional assessment be levied until all previous assessments have been paid up, or all powers to collect the same exhausted. If by-laws provide a different method for levying assessments than that hereinbefore provided (except as to service of notices), it must be pursued. Assessments may be levied from time to time, as the same may be required, in the manner herein provided; the member calling therefor in no case to be one who, at the time, is delinquent.

Stats. 1866, 828, Sec. 2.

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## TITLE XII.

### INSURANCE.

#### CHAPTER I. INSURANCE IN GENERAL.

##### II. MARINE INSURANCE.

##### III. FIRE INSURANCE.

##### IV. LIFE AND HEALTH INSURANCE.

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#### CHAPTER I.

##### INSURANCE IN GENERAL.

###### ARTICLE I. DEFINITION OF INSURANCE.

###### II. WHAT MAY BE INSURED.

###### III. PARTIES.

###### IV. INSURABLE INTEREST.

###### V. CONCEALMENT AND REPRESENTATION.

###### VI. THE POLICY.

###### VII. WARRANTIES.

###### VIII. PREMIUMS.

###### IX. LOSS.

###### X. NOTICE OF LOSS.

###### XI. DOUBLE INSURANCE.

###### XII. RE-INSURANCE.

ARTICLE I.

DEFINITION OF INSURANCE.

What.

Insurance, what.  
Insurance is a contract whereby one un-  
der another against loss, damage or  
an unknown or contingent event.

C., Sec. 1357.

ARTICLE II.

WHAT MAY BE INSURED.

What events may be insured against.  
What may be insured against.  
Lottery or lottery prize unauthorized.  
of insurance.  
of this chapter.

What events may be insured against.  
contingent or unknown event,  
whereby, which may damnify a person  
in interest, or create a liability  
to be insured against, subject to the  
provisions of this chapter.

C., Sec. 1358.

Insurance of lottery or lottery prize unauthorized.  
preceding section does not authorize  
insurance against the drawing of any lottery,  
or chance or ticket in a lottery draw-

Art. IV, Sec. 27 ; Stats. 1861, 229, Sec. 8.

Usual kinds of insurance.  
What usual kinds of insurance are :  
Usual kinds of insurance.

and,  
and.

C., Sec. 1359.

All subject to this chapter.  
All kinds of insurance are subject to the  
provisions of this chapter.

C., Sec. 1360.

## ARTICLE III.

## PARTIES TO THE CONTRACT

## SECTION 2538. Designation of parties.

2539. Who may insure.

2540. Who may be insured.

2541. Assignment to mortgagee of thing insured.

2542. New contract between insurer and assignee.

Designation  
of parties.

SEC. 2538. The person who undertakes to indemnify another, by a contract of insurance, is called the insurer, and the person indemnified is called the insured.

N. Y. C. C., Sec. 1361.

Who may  
insure.

SEC. 2539. Any one capable of making a contract may be an insurer, subject to the restrictions imposed by special statutes upon foreign corporations, non-residents and others.

N. Y. C. C., Sec. 1362.

Who may be  
insured.

SEC. 2540. Any one except a public enemy may be insured.

N. Y. C. C., Sec. 1363.

Assignment  
to mortgagee  
of thing  
insured.

SEC. 2541. Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

N. Y. C. C., Sec. 1364; *Bergen vs. Builders' Insurance Co.*, 28 Cal., 541.New con-  
tract betw'n  
insurer and  
assignee.

SEC. 2542. If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

N. Y. C. C., Sec. 1365.

## ARTICLE IV.

## INSURABLE INTEREST

insurable interest, what.

in what may consist.

interest of carrier or depositary.

mere expectancies.

measure of interest in property.

insurance without interest, illegal.

interest must exist.

transfer of.

loss after.

policy in the case of several subjects in one.

death of the insurer.

transfer between co-tenants in case of.

insurable interest in property, or any relation  
therein in respect thereof, of such a nature  
that the peril might directly damnify the in-  
surable interest.

Insurable  
interest,  
what.

Y. C. C., Sec. 1366.

insurable interest in property may con-  
sist in.

In what may  
consist.

interest founded on an existing inter-  
est.

interest, coupled with an existing interest in  
the expectancy arises.

Y. C. C., Sec. 1367.

carrier or depositary of any kind has an  
interest in a thing held by him as such, to the  
extent of.

Interest of  
carrier or  
depositary.

Y. C. C., Sec. 1368.

mere contingent or expectant interest in  
property founded on an actual right to the thing,  
and contract for it, is not insurable.

Mere ex-  
pectancies.

Y. C. C., Sec. 1369.

measure of an insurable interest in  
property, to the extent to which the insured might be  
damaged or injured by its destruction.

Measure of  
interest in  
property.

Y. C. C., Sec. 1370.

Insurance  
without  
interest,  
illegal.

SEC. 2551. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void.

N. Y. C. C., Sec. 1371.

When inter-  
est must  
exist.

SEC. 2552. An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime.

N. Y. C. C., Sec. 1372.

Effect of  
transfer.

SEC. 2553 Except in the cases specified in the next four sections, and in the cases of life, accident and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person.

N. Y. C. C., Sec. 1373.

Transfer  
after loss.

SEC. 2554. A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

N. Y. C. C., Sec. 1374.

Exception  
in the case  
of several  
subjects in  
one policy.

SEC. 2555. A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

N. Y. C. C., Sec. 1375.

In case of  
the death of  
the insurer.

SEC. 2556. A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

N. Y. C. C., Sec. 1376.

In the case  
of transfer  
between  
co-tenants.

SEC. 2557. A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

N. Y. C. C., Sec. 1377.

## ARTICLE V.

## CONCEALMENT AND REPRESENTATIONS.

**SECTION 2561. Concealment, what.**

2562. Effect of concealment.

2563. What must be disclosed.

2564. Matters which need not be communicated without inquiry.

2565. Test of materiality.

2566. Matters which each is bound to know.

2567. Waiver of communication.

2568. Interest of insured.

2569. Fraudulent warranty.

2570. Matters of opinion.

2571. Representation, what.

2572. When made.

2573. How interpreted.

2574. Representation as to future.

2575. How may affect policy.

2576. When may be withdrawn.

2577. Time intended by representation.

2578. Representing information.

2579. Falsity.

2580. Effect of falsity.

2581. Materiality.

2582. Application of provisions of this article.

**SEC. 2561.** A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

Concealment  
what.

N. Y. C. C., Sec. 1378.

**SEC. 2562.** A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

Effect of  
concealment

N. Y. C. C., Sec. 1379.

**SEC. 2563.** Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

What must  
be disclosed.

N. Y. C. C., Sec. 1380.

**NOTE.**—The New York Code Commissioners say :

"This appears to be the rule in regard to fire insurance (Gates vs. Madison County Ins. Co., 5 N. Y., 469, 476). Though a fuller disclosure is required in marine insurance (see the chapter thereon), it depends not on a difference of principle, but of the extent of which the insurer may be deemed cognizant of the fact."

Matters  
which need  
not be com-  
municated  
without  
inquiry.

SEC. 2564. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant.
3. Those of which the other waives communication.
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

N. Y. C. C., Sec. 1381; 2 Duer Ins., 552; 577, Sec. 15; 579, Sec. 16.

Test of  
materiality.

SEC. 2565. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

N. Y. C. C., Sec. 1382; 2 Duer Ins., 382-403.

Matters  
which each  
is bound to  
know.

SEC. 2566. Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

N. Y. C. C., Sec. 1383; 2 Duer Ins., 560.

Waiver of  
communica-  
tion.

SEC. 2567. The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

N. Y. C. C., Sec. 1384.

Interest of  
insured.

SEC. 2568. Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by Sec. 2587.

N. Y. C. C., Sec. 1385.

Fraudulent  
warranty.

SEC. 2569. An intentional and fraudulent omission, on the part of one insured, to communicate information of



**matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.**

N. Y. C. C., Sec. 1386 ; 2 Duer Ins., 435, 573.

**SEC. 2570.** Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question. Matters of opinion.

N. Y. C. C., Sec. 1387 ; 2 Duer Ins., 583.

**SEC. 2571.** A representation may be oral or written. Representation, what.

N. Y. C. C., Sec. 1388.

**SEC. 2572.** A representation may be made at the same time with issuing the policy, or before it. When made.

N. Y. C. C., Sec. 1389—modified.

**SEC. 2573.** The language of a representation is to be interpreted by the same rules as the language of contracts in general. How interpreted.

N. Y. C. C., Sec. 1390.

**SEC. 2574.** A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation. Representation as to future.

N. Y. C. C., Sec. 1391 ; 2 Duer Ins., 664.

**SEC. 2575.** A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty. How may effect policy.

N. Y. C. C., Sec. 1392 ; 2 Duer Ins., 671.

**SEC. 2576.** A representation may be altered or withdrawn before the insurance is effected, but not afterwards. When may be withdrawn.

N. Y. C. C., Sec. 1393 ; 2 Duer Ins., 679.

**SEC. 2577.** The completion of the contract of insurance is the time to which a representation must be presumed to refer. Time intended by representation.

N. Y. C. C., Sec. 1394 ; 2 Duer Ins., 679.

**SEC. 2578.** When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, Representing information.

in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured whose duty it is to give the intelligence.

N. Y. C. C., Sec. 1395; 2 Duer Ins., 703-705.

**Falsity.**

SEC. 2579. A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

N. Y. C. C., Sec. 1396.

**Effect of falsity.**

SEC. 2580. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

N. Y. C. C., Sec. 1397; 2 Duer Ins., 680, 749-769; 5 id., 587.

**Materiality.**

SEC. 2581. The materiality of a representation is determined by the same rule as the materiality of a concealment.

N. Y. C. C., Sec. 1398.

**Application of provisions of this article**

SEC. 2582. The provisions of this article apply as well to a modification of a contract of insurance as to its original formation.

N. Y. C. C., Sec. 1399.

## ARTICLE VI.

### THE POLICY.

SECTION 2586. Policy, what.

2587. What must be specified in a policy.

2588. Whose interest is covered.

2589. Insurance by agent or trustee.

2590. Insurance by part owner.

2591. General terms.

2592. Successive owners.

2593. Transfer of the thing insured.

2594. Open and valued policies.

2595. Open policy, what.

2596. Valued policy, what.

2597. Running policy, what.

2598. Effect of receipt.

2599. Agreement not to transfer.

**Policy, what.**

SEC. 2586. The written instrument, in which a contract of insurance is set forth, is called a policy of insurance.

N. Y. C. C., Sec. 1400.

**SEC. 2587.** A policy of insurance must specify—

1. The parties between whom the contract is made.
2. The rate of premium.
3. The property or life insured.
4. The interest of the insured in property insured, if he is not the absolute owner thereof.
5. The risks insured against; and,
6. The period during which the insurance is to continue.

What must  
be specified  
in a policy.

Mr. Duer recommends its introduction from the French law into ours, and the Commissioners think the recommendation a good one (see 2 Duer Ins., 463.)

N. Y. C. C., Sec. 1401.

**SEC. 2588.** When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

Whose  
interest is  
covered.

N. Y. C. C., Sec. 1402.

**SEC. 2589.** When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

Insurance  
by agent or  
trustee.

N. Y. C. C., Sec. 1403.

**SEC. 2590.** To render an insurance, effected by one partner, or part owner, applicable to the interest of his copartners, or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

Insurance by  
part owner.

N. Y. C. C., Sec. 1404; 3 Kent Com., 258.

**SEC. 2591.** When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

General  
terms.

N. Y. C. C., Sec. 1405.

**SEC. 2592.** A policy may be so framed that it will insure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

Successive  
owners.

N. Y. C. C., Sec. 1406.

**SEC. 2593.** The mere transfer of a thing insured does not transfer the policy, but suspends it until the same

Transfer of  
the thing  
insured.

person becomes the owner of both the policy and the thing insured.

N. Y. C. C., Sec. 1407.

Open and  
valued  
policies.

SEC. 2594. A policy is either open or valued.

N. Y. C. C., Sec. 1408.

Open policy,  
what.

SEC. 2595. An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

N. Y. C. C., Sec. 1409 ; 3 Kent Com., 272.

Valued  
policy, what.

SEC. 2596. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

N. Y. C. C., Sec. 1410.

Running  
policy, what.

SEC. 2597. A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

N. Y. C. C., Sec. 1411.

Effect of  
receipt.

SEC. 2598. An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

N. Y. C. C., Sec. 1412.

Agreement  
not to  
transfer.

SEC. 2599. An agreement made before a loss, not to transfer the claim of a person insured against the insurer, after the loss has happened, is void.

N. Y. C. C., Sec. 1413.

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## ARTICLE VII.

### WARRANTIES.

SECTION 2603. Warranty, express or implied.

2604. Form.

2605. Warranty must be in policy.

2606. Past, present and future warranties

2607. Warranty as to past or present.

2608. Warranty as to the future.

2609. Performance excused.

**SECTION 2610.** What acts avoid the policy.

2611. Policy may provide for avoidance.

2612. Breach without fraud.

**SEC. 2603.** A warranty is either express or implied.

N. Y. C. C., Sec. 1414.

Warranty,  
express or  
implied.

**SEC. 2604.** No particular form of words is necessary  
to create a warranty.

N. Y. C. C., Sec. 1415.

Form.

**SEC. 2605.** Every express warranty, made at or before  
the execution of a policy, must be contained in the policy  
itself, and another instrument, whether upon the same  
paper or not, cannot be referred to as making a part of the  
policy for this purpose, even by agreement of the parties.

N. Y. C. C., Sec. 1416.

Warranty  
must be in  
policy.

**SEC. 2606.** A warranty may relate to the past, the  
present, the future, or to any or all of these.

N. Y. C. C., Sec. 1417.

Past, present  
and future  
warranties.

**SEC. 2607.** A statement in a policy, of a matter relat-  
ing to the person or thing insured, or to the risk, as a  
fact, is an express warranty thereof.

N. Y. C. C., Sec. 1418.

Warranty as  
to past or  
present.

**SEC. 2608.** A statement in a policy, which imports  
that it is intended to do or not to do a thing which mate-  
rially affects the risk, is a warranty that such act or  
omission shall take place.

N. Y. C. C., Sec. 1419; 5 Duer Ins., 587.

Warranty  
as to the  
future.

**SEC. 2609.** When, before the time arrives for the per-  
formance of a warranty relating to the future, a loss in-  
sured against happens, or performance becomes unlawful  
or impossible, the omission to fulfil the warranty does not  
avoid the policy.

N. Y. C. C., Sec. 1420.

Performance  
excused.

**SEC. 2610.** The violation of a material warranty, or  
other material provision of a policy, on the part of either  
party thereto, entitles the other to rescind.

N. Y. C. C., Sec. 1421.

What acts  
avoid the  
policy

**SEC. 2611.** A policy may declare that a violation of  
specified provisions thereof shall avoid it; otherwise the

Policy may  
provide for  
avoidance.

breach of an immaterial provision does not avoid the policy.

N. Y. C. C., Sec. 1422.

Breach  
without  
fraud.

Sec. 2612. A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs; or, where it is broken in its inception, prevents the policy from attaching to the risk.

N. Y. C. C., Sec. 1423; 2 Duer Ins., 435.

## ARTICLE VIII.

### PREMIUM.

SECTION 2616. When premium is earned.

2617. Return of premium.

2618. When none allowed.

2619. Return for fraud.

2620. Over-insurance by several insurers.

2621. Contribution.

2622. Proportionate contribution.

When pre-  
mium is  
earned.

Sec. 2616. An insurer is entitled to payment of the premium, as soon as the thing insured is exposed to the peril insured against.

N. Y. C. C., Sec. 1424.

Return of  
premium.

Sec. 2617. A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against; or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole of that time.

N. Y. C. C., Sec. 1425.

When none  
allowed.

Sec. 2618. If a peril insured against has existed, and the insurer has been liable, for any period, however short, the insured is not entitled to a return of premium, so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under the preceding section.

N. Y. C. C., Sec. 1427.

Return for  
fraud.

Sec. 2619. A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on

**account of facts, of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.**

N. Y. C. C., Sec. 1426.

**SEC. 2620.** In case of an over-insurance by several insurers, the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

Over-insurance by several insurers.

N. Y. C. C., Sec. 1428.

**SEC. 2621.** When an over-insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned, in proportion to the amount insured by their respective policies.

Contribution

N. Y. C. C., Sec. 1429.

**SEC. 2622.** When an over-insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

Proportionate contribution.

N. Y. C. C., Sec. 1430.

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## ARTICLE IX.

### LOSS.

**SECTION 2626.** Perils, remote and proximate.

2627. Loss incurred in rescue from peril.

2628. Excepted perils.

2629. Negligence and fraud.

**SEC. 2626.** An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

Perils, remote and proximate.

N. Y. C. C., Sec. 1431.

Loss incurred in rescue from peril.

SEC. 2627. An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril, not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

N. Y. C. C., Sec. 1432.

Excepted perils.

SEC. 2628. Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.

N. Y. C. C., Sec. 1433; 1 Duer, 371.

Negligence and fraud.

SEC. 2629. An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, nor by fraud or negligence on the part of his agents or others.

N. Y. C. C., Sec. 1434.

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## ARTICLE X.

### NOTICE OF LOSS.

SECTION 2633. Notice of loss.

2634. Preliminary proofs.

2635. Waivers of defects in notice, etc.

2636. Waiver of delay.

2637. Certificate, when dispensed with.

Notice of loss.

SEC. 2633. In case of loss, an insurer is exonerated, if notice thereof is not given to him by some person insured, or entitled to the benefit of an insurance, without unnecessary delay.

N. Y. C. C., Sec. 1435.

Preliminary proofs.

SEC. 2634. When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a Court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

N. Y. C. C., Sec. 1436.



**SEC. 2635.** All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

Waivers of defects in notice, etc.

N. Y. C. C., Sec. 1437.

**SEC. 2636.** Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

Waiver of delay.

N. Y. C. C., Sec. 1438.

**SEC. 2637.** If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

Certificate, when dispensed with.

N. Y. C. C., Sec. 1439.

## ARTICLE XL

### DOUBLE INSURANCE.

**SECTION 2641.** Double insurance.

2642. Contribution in case of double insurance.

**SEC. 2641.** A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

Double insurance.

N. Y. C. C., Sec. 1440.

**SEC. 2642.** In case of double insurance, the insured may claim payment of a loss from any one of the insurers, who, on paying it, may require the others to contribute ratably thereto.

Contribution in case of double insurance.

N. Y. C. C., Sec. 1441; Ang. Ins., 22; 3 Kent Com., 280.

## ARTICLE XII.

## RE-INSURANCE.

SECTION 2646. Re-insurance, what.

2647. Disclosures required.

2648. Re-insurance presumed to be against liability.

2649. Original insured has no interest.

Re-insur-  
ance, what.

SEC. 2646. A contract of re-insurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

N. Y. C. C., Sec. 1442.

Disclosures  
required.

SEC. 2647. Where an insurer obtains re-insurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which is material to the risk.

N. Y. C. C., Sec. 1443; 2 Duer Ins., 429.

Re-insur-  
ance pre-  
sumed to be  
against  
liability.

SEC. 2648. A re-insurance is presumed to be a contract of indemnity against liability, and not merely against damage.

N. Y. C. C., Sec. 1444; Ang. Ins., 138.

Original  
insured has  
no interest.

SEC. 2649. The original insured has no interest in a contract of re-insurance.

N. Y. C. C., Sec. 1445.

## CHAPTER II.

## MARINE INSURANCE.

NOTE.—We repeat that “rules respecting marine insurance which are but applications of the principles of international law to this subject are not embraced in these provisions, as they are not within the scope of a municipal statute.”

## ARTICLE I. DEFINITION OF MARINE INSURANCE.

II. INSURABLE INTEREST.

III. CONCEALMENT.

IV. REPRESENTATIONS.

V. IMPLIED WARRANTIES.

VI. THE VOYAGE, AND DEVIATION.

VII. LOSS.

VIII. ABANDONMENT.

IX. MEASURE OF INDEMNITY

## ARTICLE I.

## DEFINITION OF MARINE INSURANCE.

SECTION 2655. Marine insurance, what.

SEC. 2655. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time.

Marine  
insurance,  
what.

N. Y. C. C., Sec. 1446; 3 Kent Com., 203.

## ARTICLE II.

## INSURABLE INTEREST.

SECTION 2659. Insurable interest in a ship.

2660. Interest reduced by bottomry.

2661. Freightage, what.

2662. Expected freightage.

2663. Interest in expected freightage, what.

2664. Insurable interest in profits.

2665. Insurable interest of charterer.

SEC. 2659. The owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss.

Insurable  
interest in  
a ship.

N. Y. C. C., Sec. 1447.

SEC. 2660. The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry.

Interest  
reduced by  
bottomry.

N. Y. C. C., Sec. 1448.

SEC. 2661. Freightage, in the sense of a policy of marine insurance, signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others.

Freightage  
what.

The word "freightage" is used throughout this Code, instead of "freight," to signify the hire of a carrier, for the obvious reason that the latter word properly means the thing carried. The word "freightage" is given in Webster's, Worcester's and Bouvier's Dictionaries, in the sense in which it is here used.

N. Y. C. C., Sec. 1449.

SEC. 2662. The owner of a ship has an insurable interest in expected freightage which he would have certainly

Expected  
freightage.

earned but for the intervention of a peril insured against.

N. Y. C. C., Sec. 1450.

Interest in  
expected  
freightage,  
what.

SEC. 2663. The interest mentioned in the last section exists, in the case of a charter party, when the ship has broken ground on the chartered voyage; and, if a price is to be paid for the carriage of goods, when they are actually on board, or there is some contract for putting them on board, and both ship and goods are ready for the specified voyage.

N. Y. C. C., Sec. 1451.

Insurable  
interest in  
profits.

SEC. 2664. One who has an interest in the thing from which profits are expected to proceed, has an insurable interest in the profits.

N. Y. C. C., Sec. 1452.

Insurable  
interest of  
charterer.

SEC. 2665. The charterer of a ship has an insurable interest in it, to the extent that he is liable to be damaged by its loss.

N. Y. C. C., Sec. 1453.

### ARTICLE III.

#### CONCEALMENT.

SECTION 2669. Information must be communicated.

2670. Material information.

2671. Presumption of knowledge of loss.

2672. Concealments which only affect the risk in question.

Information  
must be com-  
municated.

SEC. 2669. In marine insurance each party is bound to communicate, in addition to what is required by Sec. 2563, all the information which he possesses, material to the risk, except such as is mentioned in Sec. 2564, and to state the exact and whole truth in relation to all matters that he represents, or upon inquiry assumes to disclose.

N. Y. C. C., Sec. 1454; 2 Duer Ins., 381, 388; Ang. Ins., 200.

Material  
information.

SEC. 2670. In marine insurance, information of the belief or expectation of a third person, in reference to a material fact, is material.

N. Y. C. C., Sec. 1455; 2 Duer Ins., 388.

**SEC. 2671.** A person insured by a contract of marine insurance is presumed to have had knowledge, at the time of insuring, of a prior loss, if the information might possibly have reached him in the usual mode of transmission, and at the usual rate of communication.

Presumption  
of knowledge  
of loss.

This is the rule which prevails in continental Europe ; and its adoption here is recommended by Mr. Duer (2 Duer Ins., 433).

N. Y. C. C., Sec. 1456.

**SEC. 2672.** A concealment in a marine insurance, in respect to any of the following matters, does not vitiate the entire contract, but merely exonerates the insurer from a loss resulting from the risk concealed :

Conceal-  
ments which  
only affect  
the risk in  
question.

1. The national character of the insured.
2. The liability of the thing insured to capture and detention.
3. The liability to seizure from breach of foreign laws of trade.
4. The want of necessary documents ; and,
5. The use of false and simulated papers.

N. Y. C. C., Sec. 1457.

#### ARTICLE IV.

##### REPRESENTATIONS.

**SECTION 2676.** Effect of intentional falsity.

**2677.** Representation of expectation.

**SEC. 2676.** If a representation, by a person insured by a contract of marine insurance, is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract.

Effect of  
intentional  
falsity.

N. Y. C. C., Sec. 1458.

**SEC. 2677.** The eventual falsity of a representation as to expectation does not, in the absence of fraud, avoid a contract of insurance.

Representa-  
tion of  
expectation.

N. Y. C. C., Sec. 1459.

## ARTICLE V.

## IMPLIED WARRANTIES.

## SECTION 2681. Warranty of seaworthiness.

2682. Seaworthiness, what.

2683. At what time seaworthiness must exist.

2684. What things are required to constitute seaworthiness.

2685. Different degrees of seaworthiness at different stages of the voyage.

2686. Unseaworthiness during the voyage.

2687. Seaworthiness for purposes of insurance on cargo.

2688. Neutral papers.

Warranty of  
seaworthi-  
ness.

SEC. 2681. In every marine insurance upon ship or freightage, or upon anything belonging to the shipowner, unless made for a specified length of time, a warranty is implied that the ship shall be seaworthy.

N. Y. C. C., Sec. 1460.

Seaworthi-  
ness, what.

SEC. 2682. A ship is seaworthy, when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy.

N. Y. C. C., Sec. 1461.

At what  
time seawor-  
thiness must  
exist.

SEC. 2683. An implied warranty of seaworthiness is complied with if the ship is seaworthy at the time of the commencement of the risk.

N. Y. C. C., Sec. 1462.

What things  
are required  
to constitute  
seaworthi-  
ness.

SEC. 2684. A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables and anchors, cordage and sails, food, water, fuel and lights, and other necessary or proper stores and implements for the voyage.

N. Y. C. C., Sec. 1463.

Different  
degrees of  
seaworthi-  
ness at dif-  
ferent stages  
of the voy-  
age.

SEC. 2685. Where different portions of the voyage, contemplated by a policy, differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with, if, at the commencement of each portion, the ship is seaworthy with reference to that portion.

N. Y. C. C., Sec. 1464.

## CIVIL CODE.

a ship becomes unseaworthy during an insurance relates, an unreasonable defect exonerates the insurer from loss arising therefrom.

N. Y. C. C., Sec. 1465.

Sec. 2687. A ship which is seaworthy for the purpose of an insurance upon the ship, may, nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo.

N. Y. C. C., Sec. 1466; 1 Phil. Ins., Sec. 723.

Sec. 2688. Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any cargo which casts reasonable suspicion thereon.

N. Y. C. C., Sec. 1467.

## ARTICLE VI.

### THE VOYAGE AND DEVIATION.

2692. Voyage insured, how determined.

2693. Course of sailing, how determined.

2694. Deviation, what.

2695. When proper.

2696. When improper.

2697. Deviation exonerates the insurer.

2692. When the voyage contemplated by a policy is defined by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between those places.

N. Y. C. C., Sec. 1468.

2693. If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way of sailing in the places specified, which, to a master of ordinary skill and discretion, would seem the most natural, and advantageous.

N. Y. C. C., Sec. 1469.

2694. Deviation is a departure from the course of sailing insured, mentioned in the last two sections,

or an unreasonable delay in pursuing the voyage; or the commencement of an entirely different voyage.

N. Y. C. C., Sec. 1470.

When  
proper.

SEC. 2695. A deviation is proper—

1. When caused by circumstances over which neither the master nor the owner of the ship has any control.

2. When necessary to comply with a warranty, or to avoid a peril, whether insured against or not.

3. When made in good faith, and upon reasonable grounds of belief in its necessity to avoid a peril; or,

4. When made in good faith, for the purpose of saving human life, or relieving another vessel in distress.

N. Y. C. C., Sec. 1471; 3 Kent Com., 323.

When  
improper.

SEC. 2696. Every deviation, not specified in the last section, is improper.

N. Y. C. C., Sec. 1472.

Deviation  
exonerates  
the insurer.

SEC. 2697. An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation.

N. Y. C. C., Sec. 1473.

## ARTICLE VII.

### LOSS.

SECTION 2701. Total and partial loss.

2702. Partial loss.

2703. Actual and constructive total loss.

2704. Actual total loss, what.

2705. Constructive total loss.

2706. Presumed actual loss.

2707. Insurance on cargo, etc., when voyage is broken up.

2708. Cost of reshipment, etc.

2709. When insured is entitled to payment.

2710. Abandonment of goods on insurance of profits.

2711. Average loss.

2712. Insurance against total loss.

Total and  
partial loss.

SEC. 2701. A loss may be either total or partial.

N. Y. C. C., Sec. 1474.

Partial loss.

SEC. 2702. Every loss which is not total is partial.

N. Y. C. C., Sec. 1475; Bouvier's Law Dict., *Loss*.



loss may be either actual or constructive total loss.  
 , Sec. 1476.

Actual total loss is caused by—  
 of the thing insured.  
 ng by sinking, or by being broken

the thing which renders it valueless  
 poses for which he held it; or,  
 which entirely deprives the owner  
 the port of destination, of the thing  
 , Sec. 1477.

Constructive total loss is one which gives  
 right to abandon, under Sec. 2717.  
 , Sec. 1478.

Presumed actual loss may be presumed from the  
 ship without being heard of; and  
 which is sufficient to raise this pre-  
 sume circumstances of the case.  
 , Sec. 1479.

Insurance on cargo, etc., when voyage is broken up.  
 ship is prevented, at an interme-  
 diate stage of the voyage, the master must  
 procure, in the same or a contigu-  
 ous vessel, for the purpose of conveying the  
 cargo; and the liability of a marine  
 insurer after they are thus reshipped.  
 , Sec. 1480.

Cost of reshipment, etc.  
 In addition to the liability mentioned in  
 the last section, the insurer is bound for damages,  
 including, storage, reshipment, extra  
 charges and other expenses incurred in saving  
 the cargo, up to the amount of the sum insured,  
 , Sec. 1481.

When insured is entitled to payment.  
 actual total loss a person insured  
 without notice of abandonment.  
 , Sec. 1482.

Abandonment of goods on insurance of profits.

SEC. 2710. Where profits are insured, but the goods are not insured, a marine insurer is not liable for a constructive total loss unless the insured offers to abandon the goods.

N. Y. C. C., Sec. 1483.

Average loss.

SEC. 2711. Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any loss, not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it becomes entirely worthless.

N. Y. C. C., Sec. 1484.

Insurance against total loss.

SEC. 2712. An insurance confined in terms to a total loss, does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the entire thing insured, and also a general average loss.

N. Y. C. C., Sec. 1485.

## ARTICLE VIII.

### ABANDONMENT.

SECTION 2716. Abandonment, what.

2717. When insured may abandon.

2718. Must be unqualified.

2719. When may be made.

2720. Abandonment may be defeated.

2721. How made.

2722. Requisites of notice.

2723. No other cause can be relied on.

2724. Effect.

2725. Waiver of formal abandonment.

2726. Agents of the insured become agents of the insurer.

2727. Acceptance not necessary.

2728. Acceptance conclusive.

2729. Accepted abandonment, irrevocable.

2730. Freightage, how affected by abandonment of ship.

2731. Refusal to accept.

2732. Omission to abandon.

Abandonment, what.

SEC. 2716. Abandonment is the act by which, after a constructive total loss, a person insured by a contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured.

N. Y. C. C., Sec. 1486.

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ithout incurrin  
ake under the

eing cargo or  
d, nor another

by the master, within a reasonable time,  
reasonable diligence, to forward the cargo, wi  
the like expense or risk. But freightage  
case be abandoned, unless the ship is also

N. Y. C. C., Sec. 1487.

Sec. 2718. An abandonment must be  
not conditional.

N. Y. C. C., Sec. 1488.

9. An abandonment must be  
time after the information o  
commencement of the voyage,  
doning has information of its co

N. Y. C. C., Sec. 1489.

10. Where the information up  
nt has been made proves in  
ed was so far restored when th  
that there was then in fact no  
nt becomes ineffectual.

N. Y. C. C., Sec. 1490.

11. Abandonment is made by  
the insurer; which may be doi

N. Y. C. C., Sec. 1491.

Requisites  
of notice.

SEC. 2722. A notice of abandonment must be **explicit**; and must specify the particular cause of the abandonment; but need state only enough to show that there is **probable** cause therefor, and need not be accompanied with proof of interest or of loss.

N. Y. C. C., Sec. 1492.

No other  
cause can be  
relied on.

SEC. 2723. An abandonment can be sustained only upon the cause specified in the notice thereof.

N. Y. C. C., Sec. 1493.

Effect.

SEC. 2724. An abandonment is equivalent to a transfer, by the insured, of his interest, to the insurer, with all the chances of recovery and indemnity.

N. Y. C. C., Sec. 1494.

Waiver of  
formal abandon-  
ment.

SEC. 2725. If a marine insurer pays for a loss as if it were an actual total loss, he is entitled to whatever may remain of the thing insured, or its proceeds or salvage, as if there had been a formal abandonment.

N. Y. C. C., Sec. 1495.

Agents of  
the insured  
become  
agents of the  
insurer.

SEC. 2726. Upon an abandonment, acts done in good faith, by those who were agents of the insured in respect to the thing insured, subsequent to the loss, are at the risk of the insurer, and for his benefit.

N. Y. C. C., Sec. 1496.

Acceptance  
not neces-  
sary.

SEC. 2727. An acceptance of an abandonment is not necessary to the rights of the insured, and is not to be presumed from the mere silence of the insurer, upon his receiving notice of abandonment.

N. Y. C. C., Sec. 1497.

Acceptance  
conclusive.

SEC. 2728. The acceptance of an abandonment, whether express or implied, is conclusive upon the parties, and admits the loss and the sufficiency of the abandonment.

N. Y. C. C., Sec. 1498.

Accepted  
abandon-  
ment, irre-  
vocable.

SEC. 2729. An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded.

N. Y. C. C., Sec. 1499.

Freightage,  
how affected  
by abandon-  
ment of ship

SEC. 2730. On an accepted abandonment of a ship, freightage earned previous to the loss belongs to the

the freightage subsequently earned by the ship.

C. C., Sec. 1500.

insurer refuses to accept a valid abandonment as upon an actual total loss, deducts any proceeds of the thing insured from the hands of the insured.

Refusal to accept.

C. C., Sec. 1501.

person insured omits to abandon, he covers his actual loss.

Omission to abandon.

C. C., Sec. 1502.

## ARTICLE IX.

### MEASURE OF INDEMNITY.

, when conclusive.

as.

apportioned.

applied to profits.

gross loss under an open policy.

of thing damaged.

direct expenses.

average.

valuation.

new for old.

valuation in a policy of marine insurance on the parties thereto, in the adjustment of a partial or total loss, if the insured has not elected, and there is no fraud on his part; if the thing has been hypothecated by bottomry, before its insurance, and without the person actually procuring the insurance, the insurer shall pay the real value. But a valuation clause entitles the insurer to rescind the contract.

Valuation, when conclusive.

C. C., Sec. 1503 ; 3 Kent Com., 274.

marine insurer is liable, upon a partial loss, for the proportion of the amount insured by him to the value of the whole interest in the property insured.

Partial loss.

C. C., Sec. 1504.

**Profits.**

**SEC. 2738.** Where profits are separately insured in a contract of marine insurance, the insured is entitled to recover, in case of loss, a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole.

N. Y. C. C., Sec. 1505.

**Valuation apportioned.**

**SEC. 2739.** In case of a valued policy of marine insurance on freightage or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part.

N. Y. C. C., Sec. 1506 ; 3 Kent Com., 275.

**Valuation applied to profits.**

**SEC. 2740.** When profits are valued and insured, by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount.

N. Y. C. C., Sec. 1507.

**Estimating loss under an open policy.**

**SEC. 2741.** In estimating a loss under an open policy of marine insurance, the following rules are to be observed :

1. The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured.

2. The value of cargo is its actual cost to the insured, when laden on board, or where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival.

3. The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it ; and,

4. The cost of insurance is in each case to be added to the value thus estimated.

N. Y. C. C., Sec. 1508 ; 3 Kent Com., 335, 336.

**Arrival of thing damaged.**

**SEC. 2742.** If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the

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market price at that port, of the  
to the market price it would

C. C., Sec. 1509; 3 Kent Com., 336.

marine insurer is liable for all the  
on a loss which forces the ship  
and where it is agreed that the  
for the recovery of the property  
the expense incurred thereby  
case, being in addition to a total  
loss.

C. C., Sec. 1510; 3 Kent Com., 339.

marine insurer is liable for a loss  
through a contribution in respect  
red to be made by him towards  
called for by a peril insured against.  
C. C., Sec. 1511.

where a person insured by a contract  
is a demand against others for contribution  
in the whole loss from the insurer  
his own right to contribution.  
C. C., Sec. 1512.

in the case of a partial loss of a ship  
materials are to be applied to  
new, and whether the ship is new or  
liable for only two-thirds of the  
repairs, except that he must pay  
in full, and for sheathing metal  
two and one-half per cent. for  
nails fastened to the ship.

C. C., Sec. 1513.

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## CHAPTER III.

### FIRE INSURANCE.

representation.  
increasing risk.  
not increasing risk.  
insured.  
of indemnity.

False representation.

SEC. 2752. An insurance against fire is not affected by concealment, nor by the falsity of a representation not inserted in the policy, though in a material particular, unless made with a fraudulent intent.

N. Y. C. C., Sec. 1514.

Alteration increasing risk.

SEC. 2753. An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

N. Y. C. C., Sec. 1515; Ang. Ins., 206.

Alteration not increasing risk.

SEC. 2754. An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

N. Y. C. C., Sec. 1516.

Acts of the insured.

SEC. 2755. A contract of fire insurance is not affected by any act of the insured, subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk, and is the cause of a loss.

N. Y. C. C., Sec. 1517.

Measure of indemnity.

SEC. 2756. If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured in the condition in which it was at the time of the injury; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.

N. Y. C. C., Sec. 1518.

## CHAPTER IV.

### LIFE AND HEALTH INSURANCE.

SECTION 2762. Insurance upon life, when payable.

2763. Insurable interest.

2764. Assignee, etc., of life policy need have no interest.

2765. Notice of transfer.

2766. Measure of indemnity.

Insurance upon life, when payable.

SEC. 2762. An insurance upon life may be made payable on the death of the person, or on his surviving a



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periodically so long as he shall  
dependently on the continuance or

. C. C., Sec. 1519.

any person has an insurable interest

in on whom he depends wholly  
or support.

in under a legal obligation to  
pay, or respecting property or  
illness might delay or prevent

in upon whose life any estate or  
depends.

ter has an insurable interest in the life of her  
hands in place of a parent to her. (Lord v  
115.)

. C. C., Sec. 1520.

policy of insurance upon life or  
after, will or succession to any  
in insurable interest or not, as  
er upon it whatever the insured

. C. C., Sec. 1521.

lice to an insurer of a transfer  
not necessary to preserve the value  
ence upon life or health, unless  
l.

. C. C., Sec. 1522; Ang. Ins., 413.

less the interest of a person in  
it pecuniary measurement, the  
er a policy of insurance upon  
fixed in the policy.

. C. C., Sec. 1523.

2.—This Title is adopted as a body from  
Civil Code. The various notes of the  
Commissioners are not reprinted, for econ

Duer "on Insurance" is of frequent ref  
erences generally are drawn from the New  
and eminent writers on the Law of Insur  
, we think it well adapted to our State, and  
option.

## TITLE XII.

## INDEMNITY.

## SECTION 2772. Indemnity, what.

2773. Indemnity for a future wrongful act, void.

2774. Indemnity for a past wrongful act, valid.

2775. Indemnity extends to acts of agents.

2776. Indemnity to several.

2777. Person indemnifying, liable jointly or severally with person indemnified.

2778. Rules for interpreting agreement of indemnity.

2779. When person indemnifying is a surety.

2780. Bail, what.

2781. How regulated.

Indemnity,  
what.

SEC. 2772. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

N. Y. C. C., Sec. 1524.

Indemnity  
for a future  
wrongful  
act, void.

SEC. 2773. An agreement to indemnify a person against an act thereafter to be done is void, if the act is known by such person, at the time of doing it, to be wrongful.

N. Y. C. C., Sec. 1525.

Indemnity  
for a past  
wrongful  
act, valid.

SEC. 2774. An agreement to indemnify a person against an act already done, is valid, even though the act was known to be wrongful, unless it was a felony.

N. Y. C. C., Sec. 1526.

Indemnity  
extends to  
acts of agents

SEC. 2775. An agreement to indemnify against the acts of a certain person, applies not only to his acts, and their consequences, but also to those of his agents.

N. Y. C. C., Sec. 1527.

Indemnity  
to several.

SEC. 2776. An agreement to indemnify several persons applies to each, unless a contrary intention appears.

N. Y. C. C., Sec. 1528.

Person in-  
demnifying,  
liable jointly  
or severally  
with person  
indemnified.

SEC. 2777. One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act.

N. Y. C. C., Sec. 1529.

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ec. 1530.

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e reimburse  
ver he may  
ec. 1531.

Bail, what.

SEC. 2780. Upon those contracts of indemnity which are taken in legal proceedings, as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail.

N. Y. C. C., Sec. 1532.

How regulated.

SEC. 2731. The obligations of bail are governed by the statutes specially applicable thereto.

N. Y. C. C., Sec. 1533.

## TITLE XIII.

### GUARANTY.

#### CHAPTER I. GUARANTY IN GENERAL. II. SURETYSHIP.

### CHAPTER I.

#### GUARANTY IN GENERAL.

##### ARTICLE I. DEFINITION OF GUARANTY.

##### II. CREATION OF GUARANTY.

##### III. INTERPRETATION OF GUARANTY.

##### IV. LIABILITY OF GUARANTORS.

##### V. CONTINUING GUARANTY.

##### VI. EXONERATION OF GUARANTORS.

### ARTICLE I.

#### DEFINITION OF GUARANTY.

SECTION 2787. Guaranty, what.

2788. Knowledge of principal not necessary to creation of guaranty.

Guaranty, what.

SEC. 2787. A guaranty is a promise to answer for the debt, default or miscarriage of another person.

This definition is in the precise language of the statute of frauds (2 R. S., 135, Sec. 2), except that it omits the word "special" before "promise." It of course includes a contract of suretyship, but every guarantor is not necessarily a surety.

N. Y. C. C., Sec. 1534.

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NOTE.—Sec. 12 of our statute of France of the New York statute. The second section is the one embraced in the text.

SEC. 2788. A person may become guarantor out the knowledge or consent of the principal.  
N. Y. C. C., Sec. 1535.

### ARTICLE II.

#### CREATION OF GUARANTY.

- SECTION 2792. Necessity of a consideration.  
2793. Guaranty to be in writing, etc.  
2794. Engagement to answer for obligation deemed original.  
2795. Acceptance of guaranty.

SEC. 2792. Where a guaranty is entered at the same time with the original obligation, or in acceptance of the latter by the guarantee, as to that obligation, a part of the consideration or other consideration need exist. In all other cases there must be a consideration distinct from that of the obligation.

See *Mallory vs. Gillett*, 21 N. Y., 4, where a guaranty is made, is here correct. This is the proper legal meaning of the word, as in *Vier's Dictionary*, also *Webster and Webster's* is often used in another sense.

N. Y. C. C., Sec. 1536.

SEC. 2793. Except as prescribed by the law, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a

The familiar provision of the Revised Code, that every special promise to answer for the debt, default, or miscarriage of another person, void, unless the promise be in writing, and signed by the promisor, is hereby amended, so that a memorandum thereof expressing the consideration, etc. (2 Rev. Stats., 135, Sec. 2, Sub. 1) of this Code, the Commissioners recommended that the consideration be omitted (Dr. Civ. Code, Sec. 1380). The law has since been made by the Legislature in 1863, Chap. 464; and the section in the Code now responds to the existing law.

The Commissioners have inserted in the Code a provision that the writing need not express the consideration, because by the section immediately preceding it, consideration is necessary to support a guaranty, while in others none is required. It has been held by the Court of Appeals that a contract required to be in writing, cannot be partly oral; thus, where a writing relat

the sale of land fixes the price, but refers to "terms as specified," which are not stated in writing, the memorandum is insufficient, and cannot be made good by oral evidence of the time agreed upon for payment (*Wright vs. Weeks*, 25 N. Y., 153). If, therefore, the section in the text should simply omit the former provision of the statute requiring the consideration to be stated, it might be exposed to the construction that in all those cases in which the consideration is made, by the previous section, essential to the contract, it must be stated in reducing the contract to writing.

In England the statute, 19 and 20 Vic., Chap. 97, Sec. 3, enables a party to prove the consideration of a guaranty by parol. So in Maine (Rev. Stats., 631).

N. Y. C. C., Sec. 1537.

Engagement  
to answer for  
obligation  
of another,  
when deem'd  
original.

SEC 2794. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promiser, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promiser, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes, for a commission, to sell merchandise and guaranty the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

N. Y. C. C., Sec. 1538.

## CIVIL CODE.

offer to guaranty is not binding until acceptance is communicated by the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.  
N. Y. C. C., Sec. 1539.

### ARTICLE III.

#### INTERPRETATION OF GUARANTY.

SECTION 2799. Guaranty of incomplete contract.

2800. Guaranty that an obligation is good or collectible.

2801. Recovery upon such guaranty.

2802. Guarantor's liability upon such guaranty.

Sec. 2799. In a guaranty of a contract, the terms which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common, in similar contracts, at the place where the principal contract is to be performed.

N. Y. C. C., Sec. 1540.

Sec. 2800. A guaranty to the effect that an obligation is good, or is collectible, imports that the debt is a valid one, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

Thus a guaranty in these words, indorsed on a note, "hereby guaranty the collection of the within note," imports a promise that the note can be collected of the maker, if holder, within a reasonable time and with due diligence; it requires the holder to prosecute to judgment and execution against the maker. This obligation to prosecute within a reasonable time, and with due diligence, is a condition precedent to the liability of the maker. What is a reasonable time depends on the circumstances of each case. Generally, delay which cannot have prejudiced the guarantor, will not charge him (*Gallagher vs. White*, 31 Barb., 92; see *Curtis vs. Smallman*, 14 Wend., 231; *Cooke vs. Nathan*, 34 Barb., 342; *Vanderveer vs. Wright*, 6 id., 547; *Warren vs. Watkins*, 30 Barb., 395).

N. Y. C. C., Sec. 1541.

Sec. 2801. A guaranty, such as is mentioned in the last section, is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

In *Cady vs. Sheldon* (39 Barb., 103), the defendants, upon an assignment of a bond and mortgage, made a guaranty in these words: "In consideration of, etc., we guaranty the collection of said bond." On the trial of an action on this guaranty, before a Referee, it appeared that the obligors in the bond were insolvent, and unable to pay any part of the bond, and that the premises covered by the mortgage had been sold under a prior mortgage for less than the amount due upon it. The Referee, however, nonsuited the plaintiffs. And upon appeal, one question raised was, whether the omission to sue the obligors, or attempt a foreclosure of the mortgage, precluded the plaintiffs from recovering upon the guaranty. The Court, after reviewing numerous cases (*Cumpston vs. McNair*, 1 Wend., 457; *Moakley vs. Riggs*, 19 Johns., 69; *Thomas vs. Woods*, 4 Cow., 173; *Loveland vs. Sheppard*, 2 Hill, 139; *Burt vs. Horner*, 5 Barb., 501; *Vanderveer vs. Wright*, 6 Barb., 547; *Curtis vs. Smallman*, 14 Wend., 231; *White vs. Case*, 13 Wend., 543; *Kies vs. Tift*, 1 Cow., 98; *Eddy vs. Stanton*, 21 Wend., 255; *People vs. Jansen*, 7 Johns., 332; *Hart vs. Hudson*, 6 Duer, 303; *Taylor vs. Bullen*, 6 Cow., 624; *Gallagher vs. White*, 31 Barb., 94; *Morris vs. Wadsworth*, 11 Wend., 100; 17 id., 103; *Merritt vs. Lincoln*, 21 Barb., 249; *Newell vs. Fowler*, 23 Barb., 632), stated the following principles as supported by the weight of authority:

1. That a guaranty of collection implies that a note or other evidence of debt is good and collectible against the principal debtors; and this means collectible by due course of law.

2. That, ordinarily to test that question, it is necessary that the usual legal proceedings should be resorted to, to wit, a judgment and execution against the parties primarily liable to pay; and a return of an execution unsatisfied is primarily sufficient evidence that it is not collectible.

3. That it is not indispensable that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings would be ineffectual; and proof that the principal debtors, from the period of the maturity of the debt, have been uniformly insolvent and unable to pay any part of the debt, is sufficient evidence for this purpose.

4. That legal proceedings are not a condition precedent to the liability of the guarantor, but equivalent evidence of inability to collect any part of the debt will suffice; and that, however desirable it may be to have one uniform rule—*e. g.*, the return of an execution unsatisfied against the principal debtor—as the test of the collectibility of a debt, the weight of authority does not allow that rule to be adopted.

N. Y. C. C., Sec. 1542.

Guarantor's  
liability  
upon such  
guaranty.

SEC. 2802. In the cases mentioned in Sec. 2800, the removal of the principal from the State, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal, in its effect upon the rights and obligations of the guarantor.

This is the principle adopted in *Cooke vs. Nathan*, 16 Barb., 342; but see *White vs. Case*, 13 Wend., 543; *Burt vs. Horner*, 5 Barb., 501; *Newell vs. Fowler*, 23 Barb., 628.

N. Y. C. C., Sec. 1543.





Continuing  
guaranty,  
what.

SEC. 2814. A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

N. Y. C. C., Sec. 1549.

Revocation.

SEC. 2815. A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions, which he does not renounce.

N. Y. C. C., Sec. 1550.

## ARTICLE VI.

### EXONERATION OF GUARANTORS.

SECTION 2819. What dealings with debtor exonerate guarantor.

2820. Void promises.

2821. Rescission of alteration.

2822. Part performance.

2823. Delay of creditor does not discharge guarantor.

2824. Guarantor indemnified by the debtor, not exonerated.

2825. Discharge of principal by act of law does not discharge guarantor.

What deal-  
ings with  
debtor  
exonerate  
guarantor.

SEC. 2819. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

N. Y. C. C., Sec. 1551.

Void  
promises.

SEC. 2820. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section.

N. Y. C. C., Sec. 1552.

Rescission of  
alteration.

SEC. 2821. The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

N. Y. C. C., Sec. 1553.

acceptance, by a creditor, of any thing  
 of an obligation, reduces the obliga-  
 thereof, in the same measure as that  
 does not otherwise affect it.

Part per-  
 formance.

L. C., Sec. 1554.

delay on the part of a creditor to  
 principal, or to enforce any other  
 operate a guarantor.

Delay of  
 creditor  
 does not  
 discharge  
 guarantor.

L. C., Sec. 1555.

rantor, who has been indemnified by  
 e to the creditor to the extent of the  
 anding that the creditor, without the  
 ator, may have modified the contract  
 ipal.

Guarantor  
 indemnified  
 by the debtor  
 not exoner-  
 ated.

L. C., Sec. 1556.

rantor is not exonerated by the dis-  
 pal by operation of law, without the  
 sion of the creditor.

Discharge of  
 principal by  
 act of law  
 does not  
 discharge  
 guarantor.

L. C., Sec. 1557.

## CHAPTER II.

### SURETYSHIP.

- I. WHO ARE SURETIES.
- II. LIABILITY OF SURETIES.
- III. RIGHTS OF SURETIES.
- IV. RIGHTS OF CREDITORS.
- V. LETTER OF CREDIT.

#### ARTICLE I.

##### WHO ARE SURETIES.

art.

principal may show that he is surety.

ty is one who, at the request of an-  
 rpose of securing to him a benefit,  
 for the performance by the latter of  
 a third person, or hypothecates pro-  
 refor.

Surety, what

The common definition of a surety (see Webster's, Wharton's and Burrill's Dictionaries), cannot be distinguished from that of a guarantor, and clearly covers the case of an indorser. But an indorser is not necessarily a surety (*Pitts vs. Congdon*, 2 N. Y., 352; *Hurd vs. Little*, 12 Mass., 502). nor is a guarantor, although their rights are in some important respects alike.

The distinction between a surety and a mere guarantor is, that the former enters into the contract primarily for the benefit of the debtor, while with the latter the benefit of the principal debtor is no material part of the inducement to him to contract.

N. Y. C. C., Sec. 1558.

Apparent principal may show that he is surety.

**Sec. 2832.** One who appears to be a principal, whether by the terms of a written instrument, or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal.

So held as between the parties themselves (*Rouse vs. Whited*, 25 N. Y., 170; *Barry vs. Ransom*, 12 id., 446; *Griffiths vs. Reed*, 21 Wend., 502); and so as to third persons in equity (*Hollier vs. Eyre*, 9 Clark & Fin., 1; *Davies vs. Stainbank*, 6 De G., M. & G., 679). At common law, the rule excluding oral evidence to vary a written contract excluded evidence to show that the apparent principal was a surety (*Harrison vs. Courtauld*, 3 B. & Ad., 36; *Pentum vs. Pocock*, 5 Taunt., 192; see, however, *Archer vs. Douglas*, 5 Denio, 509); and upon the authority of these cases alone—the decisions in equity not being cited by counsel on either side—the same rule has been followed in a recent case in this State (*Howard Banking Co. vs. Welchman*, 6 Bosw., 280). The fusion of law and equity in this State has superseded the common law rule. In England, since equitable defences have been admitted in common law Courts, the equitable rule has been followed and defined as in the text, by all the Judges (*Pooley vs. Harradine*, 7 El. & Bl., 431; *Greenough vs. McClelland*, 2 El. & Bl., 424; 6 Jur. [N. S.], 772; 30 L. J. [Q. B.], 15; *Taylor vs. Baggess*, 5 Hurlst. & N., 1). And see *Mohawk and Hudson River R. R. Co. vs. Costigan*, 2 Sandf. Ch., 306; *Archer vs. Douglass*, 5 Denio, 509. Compare *Casey vs. Brabason*, 10 Abb. Pr., 368; *Gahn vs. Niemcewicz*, 11 Wend., 312; *Elwood vs. Diefendorf*, 5 Barb., 398; *Chester vs. Bank of Kingston*, 16 N. Y., 336). The same rule is established in Massachusetts (*Weston vs. Chamberlin*, 7 Cush., 404; *Carpenter vs. King*, 9 Metc., 511; *Harris vs. Brooks*, 21 Pick., 195.)

N. Y. C. C., Sec. 1559.

## ARTICLE II.

### LIABILITY OF SURETIES.

**SECTION 2836.** Limit of surety's obligation.

2837. Rules of interpretation.

2838. Judgment against surety does not alter the relation.

2839. Surety exonerated by performance or offer of performance.

2840. Surety discharged by certain acts of the creditor.

## CIVIL CODE.

surety cannot be held beyond contract, and if such contract is breached, he cannot in any case be liable to a penalty.

Y. C. C., Sec. 1560.

in interpreting the terms of a contract, the same rules are to be observed as in interpreting contracts.

Y. C. C., Sec. 1561.

Notwithstanding the recovery of a judgment against a surety, the latter still remains liable to the creditor.

Y. C. C., Sec. 1562.

The performance of the principal obligation, duly made, whether by the principal or another person, exonerates a surety.

This rule seems just, though not fully supported by authority. As between the creditor and the debtor, the former is not bound to accept payment from the latter, but as respects the surety, he ought to be exonerated.

Y. C. C., Sec. 1563.

A surety is exonerated—

1. When he is released by the creditor with a guarantor;

2. When the creditor does anything to which he is prejudiced by which would naturally prove injurious to the surety or inconsistent with his security; or,

3. When the creditor does anything to which he is prejudiced by or to do anything, when required to do his duty to do.

Y. C. C., Sec. 1564.

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## ARTICLE III.

### RIGHTS OF SURETIES.

1. A surety has the same rights as a guarantor.

2. A surety may require the creditor to proceed against the principal.

3. A surety may compel principal to perform obligation.

4. A principal bound to reimburse his surety.

**SECTION 2848.** The surety acquires the right of the creditor.

2849. Surety entitled to benefit of securities held by creditor.

2850. The property of principal to be taken first.

Surety has  
rights of  
guarantor.

**SEC. 2844.** A surety has all the rights of a guarantor, whether he becomes personally responsible or not.

N. Y. C. C., Sec. 1565.

Surety may  
require the  
creditor to  
proceed  
against the  
principal.

**SEC. 2845.** A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

N. Y. C. C., Sec. 1566.

Surety may  
compel prin-  
cipal to per-  
form obliga-  
tion, when  
due.

**SEC. 2846.** A surety may compel his principal to perform the obligation when due.

N. Y. C. C., Sec. 1567.

A principal  
bound to  
reimburse  
his surety.

**SEC. 2847.** If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

N. Y. C. C., Sec. 1568.

The surety  
acquires the  
right of the  
creditor.

**SEC. 2848.** A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

N. Y. C. C., Sec. 1569.

Surety  
entitled to  
benefit of  
securities  
held by  
creditor.

**SEC. 2849.** A surety is entitled to the benefit of every security, for the performance of the principal obligation, held by the creditor, or by a co-surety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

N. Y. C. C., Sec. 1570.

The property  
of principal  
to be taken  
first.

**SEC. 2850.** Whenever property of a surety is hypothecated with property of the principal, the surety is enti-

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to specified persons by name or description, the letter is special. All other letters of credit are general.

N. Y. C. C., Sec. 1576.

Nature of  
general  
letter of  
credit.

SEC. 2862. A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

N. Y. C. C., Sec. 1577.

Extent of  
general  
letter of  
credit.

SEC. 2863. Several persons may successively give credit upon a general letter.

N. Y. C. C., Sec. 1578.

A letter of  
credit may  
be a contin-  
uing  
guaranty.

SEC. 2864. If the parties to a letter of credit appear, by its terms, to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor; but is to be deemed a continuing guaranty.

N. Y. C. C., Sec. 1579.

When notice  
to the writer  
necessary.

SEC. 2865. The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

N. Y. C. C., Sec. 1580.

The credit  
given must  
agree with  
the terms of  
the letter.

SEC. 2866. If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound except for transactions which, in these respects, conform strictly to the terms of the letter.

N. Y. C. C., Sec. 1581.

## TITLE XIV.

### LIEN.

#### CHAPTER I. LIENS IN GENERAL.

##### II. MORTGAGE.

##### III. PLEDGE.

##### IV. BOTTOMRY.

##### V. RESPONDENTIA.

##### VI. OTHER LIENS.

##### VII. STOPPAGE IN TRANSIT.



## CIVIL CODE.

Although the arrangement of this subject Commissioners believe that its propriety and will be perceived at a glance. Mortgages as under the provisions of this Code, nothing more subject, therefore, to all the general rules of li

### CHAPTER I.

#### LIENS IN GENERAL.

##### ARTICLE I. DEFINITION OF LIENS.

##### II. CREATION OF LIENS.

##### III. EFFECT OF LIENS.

##### IV. PRIORITY OF LIENS.

##### V. REDEMPTION FROM LIENS.

##### VI. EXTINCTION OF LIENS.

#### ARTICLE I.

##### DEFINITION OF LIENS.

Section 2872. Lien, what.

2873. Liens, general or special.

2874. General lien, what.

2875. Special lien, what.

2876. Prior liens.

2877. Contracts subject to provisions of this chapter.

Sec. 2872. A lien is a charge imposed upon property, by which it is made security for the performance of an act.

A lien is commonly defined as a right to retain of a specific thing, until some charge attached thereto. (Story Eq. Jur., Sec. 506; 3 Pars. C. 234). This definition is a very narrow one, and only to common law liens, exclusive of mortgages and respondentia bonds, etc.

In equity, possession was not essential. It may be an equitable lien upon a fund or subject in another, which could be maintained and enforced by the lienor's having possession, if the identity of the subject could be distinctly traced (Grinnell vs Sandf., 132). The Commissioners wish to preserve one name, both the common law and the equitable, and have sought to bring under one head all principles which affect liens by possession or by

N. Y. C. C., Sec. 1582.

NOTE.—Definition of Lien, Sec. 1180, contained in Part I, Tit. IV, Part III, Code of Civil Procedure, omitted from that Code.

Existence of  
lien does not  
affect the  
right of  
creditor.

SEC. 2892. The existence of a lien, as security for the performance of an obligation, does not affect the right of the creditor to enforce the obligation without regard to the lien.

N. Y. C. C., Sec. 1595.

Holder of  
lien not  
entitled to  
compensa-  
tion.

SEC. 2893. One who holds property by virtue of a lien thereon, is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under Secs. 1892 and 1893.

N. Y. C. C., Sec. 1596.

#### ARTICLE IV.

##### PRIORITY OF LIENS.

SECTION 2897. Priority of liens.

2898. Priority of mortgage for price.

2899. Order of resort to different funds.

Priority of  
liens.

SEC. 2897. Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.

N. Y. C. C., Sec. 1597.

Priority of  
of mortgage  
for price.

SEC. 2898. A mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

N. Y. C. C., Sec. 1598.

Order of  
resort to  
different  
funds.

SEC. 2899. Where one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself, or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested :

1. To the things upon which he has an exclusive lien.
2. To the things which are subject to the fewest subordinate liens.
3. In like manner inversely to the number of subordinate liens upon the same thing ; and,

things are within one of the foregoing  
to the same number of liens, resort

s which have not been transferred  
was created.

which have been so transferred with-  
out a valuable consideration; and,

(3.) To the things which have been so transferred for  
a valuable consideration.

N. Y. C. C., Sec. 1599.

## ARTICLE V.

### REDEMPTION FROM LIEN.

SECTION 2903. Right to redeem.

2904. Rights of inferior lienor.

2905. Redemption from lien, how made.

Sec. 2903. Every person, having an interest in prop-  
erty subject to a lien, has a right to redeem it from the  
lien, at any time after the claim is due, and before his  
right of redemption is foreclosed.

Right to  
redeem.

N. Y. C. C., Sec. 1600.

Sec. 2904. One who has a lien inferior to another,  
upon the same property, has a right—

Rights of  
inferior  
lienor.

1. To redeem the property in the same manner as its  
owner might, from the superior lien; and,

2. To be subrogated to all the benefits of the superior  
lien, when necessary for the protection of his interests,  
upon satisfying the claim secured thereby.

N. Y. C. C., Sec. 1601.

Sec. 2905. Redemption from a lien is made by per-  
forming, or offering to perform, the act for the perform-  
ance of which it is a security, and paying, or offering to  
pay, the damages, if any, to which the holder of the lien  
is entitled for delay.

Redemption  
from lien,  
how made.

N. Y. C. C., Sec. 1602.

## ARTICLE VI.

## EXTINCTION OF LIENS.

**SECTION 2909.** Lien deemed accessory to the act whose performance it secures.

2910. Extinction by sale or conversion.

2911. Lien not extinguished by lapse of time under statute of limitation.

2912. Apportionment of lien.

2913. When restoration extinguishes lien.

Lien deemed accessory to the act whose performance it secures.

**SEC. 2909.** A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

N. Y. C. C., Sec. 1603.

Extinction by sale or conversion.

**SEC. 2910.** The sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereon.

N. Y. C. C., Sec. 1604.

Lien not extinguished by lapse of time under statute of limitation.

**SEC. 2911.** A lien is extinguished by the lapse of the time within which, under the provisions of the CODE OF CIVIL PROCEDURE, an action can be brought upon the principal obligation.

N. Y. C. C., Sec. 1605.

Apportionment of lien.

**SEC. 2912.** The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible.

N. Y. C. C., Sec. 1606.

When restoration extinguishes lien.

**SEC. 2913.** The voluntary restoration of property to its owner, by the holder of a lien thereon, dependent upon possession, extinguishes the lien, as to such property, unless otherwise agreed by the parties; and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons acquiring a title to the property, or a lien thereon, in good faith, and for a good consideration; unless such restoration is made to the owner as a mere employé of the holder of the lien, or for a merely transient purpose.

N. Y. C. C., Sec. 1607.

## VIL CODE.

### AFTER II.

#### MORTGAGE.

IN GENERAL.  
OF REAL PROPERTY.  
OF PERSONAL PROPERTY.

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#### ARTICLE I.

##### AGES IN GENERAL.

1.  
age, when special.  
rest, when deemed a mortgage.  
this chapter do not affect bottomry or r

subject to defeasance, may be proved.  
may be mortgaged.  
ely held may be mortgaged.

now executed.

ng held adversely.  
not entitle mortgagee to possession.

is a contract, by which ap  
d for the performance of an  
a change of possession.

Sec. 1608.

Sec. 2920. The lien of a mortgage is special, u  
therwise expressly agreed, and is independent of  
session.

N. Y. C. C., Sec. 1609.

Sec. 2921. Every transfer of an interest in prop  
made only as a security for the performance of ano  
rt, is to be deemed a mortgage, except when, in the  
of personal property, it is accompanied by an ac  
change of possession, in which case it is to be deem  
pledge.

N. Y. C. C., Sec. 1610.

Provisions of  
this chapter  
do not affect  
bottomry or  
respondentia

SEC. 2922. Contracts of bottomry or respondentia, although in the nature of mortgages, are not affected by any of the provisions of this chapter.

N. Y. C. C., Sec. 1611.

Transfer  
made subject  
to defeas-  
ance, may  
be proved.

SEC. 2923. The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved [ex- a recorded instrument acquired in good value, or encumbrances acquired in good value by authority of any existing law], if it does not appear by the terms of the

N. Y. C. C., Sec. 1612.

any interest in property, which is capable of being mortgaged.

N. Y. C. C., Sec. 1613.

A mortgage may be created upon property of the mortgageor.

N. Y. C. C., Sec. 1614.

A power of sale may be conferred by a mortgagee or any other person, to be exercised in case of a breach of the obligation for which the mortgage is given.

N. Y. C. C., Sec. 1615.

A power of sale under a mortgage is a lien, and is to be executed only in the manner prescribed in the

CIVIL PROCEDURE.

N. Y. C. C., Sec. 1616.

NOTE.—Chap. II, Tit. II, Part III, New York Code of Civil Procedure, ought to be arranged and placed in order in the Code of Civil Procedure, or this section struck out.

A mortgage is a lien upon everything that is granted by the grantor of the property, and upon nothing else.

N. Y. C. C., Sec. 1617.

A mortgage of property held adversely to the mortgagor takes effect from the time at which he, or his assignor, obtains possession of the property, and has precedence over every lien upon the mort-

the property, created subsequently to the mortgage.

C. C., Sec. 1619.

Mortgage does not entitle the mortgagee to the property, unless authorized by the mortgage, but after the execution of mortgagee may agree to such change of a new consideration.

Mortgage does not entitle mortgagee to possession

C. C., Sec. 1620.

Mortgagee may foreclose the right of mortgagee, in the manner prescribed CIVIL PROCEDURE.

Foreclosure.

C. C., Sec. 1621.

Person whose interest is subject to the mortgage may do any act which will substantially diminish the mortgagee's security.

Waste.

C. C., Sec. 1622.

## ARTICLE II.

### MORTGAGE OF REAL PROPERTY.

Definition of real property defined. stated.

Definition of mortgage.

Mortgage is not a personal obligation.

Mortgage is paid after property passes by succession or will.

Mortgage must be acknowledged and recorded.

[IV and V, on recording, etc., applied.

Transactions protected by recording laws.

Transactions presumed to be acquired in good faith, etc.

Recently acquired title inures to mortgagee.

Mortgage must be recorded as mortgage.

Assignment of mortgage.

Mortgage, how discharged.

Mortgagee is not bound for not acknowledging satisfaction.

Mortgage of real property is called a real mortgage.

Mortgage of real property defined.

**How created.** SEC. 2937. A real mortgage can be created only by writing, with the formalities and requisites necessary in the case of the execution of a real instrument.

N. Y. C. C., Sec. 1623.

**NOTE.**—The words “under seal” struck out. This section can be consolidated with Sec. 2959 and placed in the preceding article.

**Form of mortgage.**

SEC. 2938. A real mortgage may be made in substantially the following form:

This mortgage, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, mortgageor, to C. D., of \_\_\_\_\_, mortgagee, witnesseth:

[I.] That the mortgageor mortgages to the mortgagee [*here describe the property*], as security for the payment to him of \_\_\_\_\_ dollars, on [or before] the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, with interest thereon [*or, as security for the payment of an obligation, describing it, etc.*]

[*If a power of sale is to be given, add,*] II. That in case of the non-payment of the principal sum, or of any part of the interest thereon, when due, the mortgagee may enter upon and sell the property above described, in the manner prescribed by the CIVIL CODE and the CODE OF CIVIL PROCEDURE of this State, and apply the proceeds of such sale to the satisfaction of the amount due under this mortgage, and of the expenses of the sale; the residue to be forthwith paid to the mortgageor.

[*If the interest clause is to be inserted, add,*] III. That if the interest upon the principal sum mentioned herein is not fully paid as it falls due, the entire principal shall become immediately due and payable, at the option of the mortgagee.

[*If the insurance clause is to be inserted, add,*] IV. That the mortgageor shall, at his own expense, keep the [buildings] on the said property insured against fire in a reputable insurance office, for the benefit of the mortgagee, to the extent of \_\_\_\_\_ dollars, until this mortgage is paid or otherwise extinguished.

Witnessed by:  
E\_\_\_\_\_ F\_\_\_\_\_.

Executed by:  
A\_\_\_\_\_ B\_\_\_\_\_.

**Mortgage not a personal obligation.**

SEC. 2939. A real mortgage does not bind the mortgageor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect.

N. Y. C. C., Sec. 1624.

**NOTE.**—Strike out “real,” and put this section in preceding article.



ten real property, subject to a mortgage, on death or will, the successor or devisee must pay the mortgage out of his own property, without the executor or administrator of the mortgagee's estate is an express direction in the will of the decedent that the mortgage shall be otherwise paid.

Y. C. C., Sec. 1625.

By whom  
paid after  
property  
passes by  
succession  
or will.

A real mortgage may be acknowledged or unacknowledged and recorded, in like manner with grants, and must be recorded in books kept for that purpose.

Y. C. C., Sec. 1626.

How ac-  
knowledge  
and recorded

For the purpose of determining the right of effect of recording or non-recording, a mortgage is deemed a real instrument, and is governed by the chapters on *Recording Transfers of Real Property*, and *Unlawful Transfers*.

Chaps. IV  
and V, on  
recording,  
etc., applied.

Sec. 2943. Encumbrances protected by the recording laws are defined in Sec. 1114 of this Code.

Encum-  
brances pro-  
tected by  
recording  
laws.

Sec. 2944. An encumbrance is prima facie presumed to be acquired in good faith, in like manner with a recorded instrument mentioned in Sec. 1206, but the encumbrancer must show, as against an unrecorded instrument, that the debt or obligation secured by the encumbrance was an actual bona fide debt or obligation, existing at the time of creating the encumbrance, and be subject to the rules mentioned in Secs. 1207 and 1208.

Encum-  
brances pre-  
sumed to be  
acquired in  
good faith,  
etc.

New section.]

Sec. 2945. Title acquired by the mortgagee, subsequent to the execution of the mortgage, inures to the mortgagor as security for the debt, in like manner as if acquired before the execution. The priority of application of such subsequently acquired title to successive mortgagees is determined by the existing rules of priority when no title is subsequently acquired. This section applies to other encumbrances in like manner with mortgages.

Subsequent-  
ly acquired  
title inures  
to mortgagee

New section.]

NOTE.—See Sec. 1078 of this Code.

What must  
be recorded  
as mortgage.

SEC. 2946. Every grant of real property, or of any estate therein, which appears, by any other writing, to be intended as a mortgage, within the meaning of Chap. I of this Title, must be recorded as a mortgage; and if such grant and other writing explanatory of its true character are not recorded together, at the same time and place, the grantee can derive no benefit from such record.

N. Y. C. C., Sec. 1628.

Recording  
assignment  
of mortgage.

SEC. 2947. An assignment of a real mortgage may be recorded in like manner with a mortgage, but in a separate book. Such assignment cannot be recorded unless executed, acknowledged or proved, with the same formalities as grants of real property. When recorded, it operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

N. Y. C. C., Sec. 1629.

Mortgage,  
how is-  
charged.

SEC. 2948. A recorded real mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the Recorder, who shall certify the acknowledgment in form substantially as follows: "Signed and acknowledged before me, this —— day of ——, in the year ——;" and he shall affix his official name thereto.

[New section.] Based on "Conveyances," Sec. 37.

Same.

SEC. 2949. A recorded real mortgage, if not discharged as provided in the preceding section, must be discharged upon the record, by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified, as prescribed by the chapter on *Recording Transfers*, stating that the mortgage has been paid, or otherwise satisfied and discharged.

N. Y. C. C., Sec. 1630; "Conveyances," Sec. 38.

Same.

SEC. 2950. A certificate of the discharge of a real mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record, to the book and page where the mortgage is recorded, and in the minute of the discharge made upon the record

e, to the book and page where the dis-  
led.

I. Y. C. C., Sec. 1631 ; " Conveyances," Sec. 39.

n satisfying a recorded real mortgage,  
o appears from the record to be an owner  
f the mortgage, or the personal represent-  
owner or part owner, must acknowledge  
uch mortgage, as provided in this chapter,  
ays after demand therefor, from any per-  
n the property or in any lien thereon ; and  
r refuses to make such acknowledgment  
mentioned, he shall pay one hundred dol-  
ty making the demand, and all damages  
uch neglect or refusal. The person mak-  
l must first tender to the acknowledging  
able charges in that behalf.

Penalty for  
not acknowl-  
edging sat-  
isfaction.

' Conveyances," Sec. 40.

NOTE.—Put the penal part of this section in chapter on  
al Damages.

### ARTICLE III.

#### PERSONAL MORTGAGE.

rtgage on personal property, a personal mortgage.  
perty subject to.

ne.

w created.

wer of attorney to execute.

rm of.

at be authenticated.

at be recorded.

ier sections on recording made applicable.

orded in different places.

ne allowed for travel to Recorder's office.

perty in transit exempt.

perty of common carrier, where recorded.

perty exempt from operation of the mortgage, when.

ne.

ne.

orded mortgage, notice.

rsenal mortgage, how satisfied on record.

w satisfied.

rtgagee may foreclose.

editors of mortgageor, remedy.

editors of mortgagee, remedy.

ee not apply to ships.

Mortgage on  
personal  
property, a  
personal  
mortgage.  
Property  
subject to.

SEC. 2956. A mortgage of personal property is called a personal mortgage.

SEC. 2957. All personal property is the subject of mortgage, except as provided in Sec. 2978.

Same.

SEC. 2958. Growing crops, nursery trees and other anticipated products of land are personal property, within the meaning of this article.

[New section.]

Story Eq. Jur. Sec. 1021; Wilson vs. Wilson, 32 Barb., 328. There may be a mortgage of personal property not yet in being, if it is the anticipated product of property owned by the mortgageor (as where he mortgages all the produce of his farm during a given season), taking effect upon the property as soon as it comes into existence (Conderman vs. Smith, 41 Barb., 328). But the mere expectancy of an heir apparent cannot be mortgaged (Carlton vs. Leighton, 3 Meriv., 667). See Secs. 460 and 461, for a definition of what may be transferred.

NOTE.—In New York all personal property may be mortgaged—mortgage to be filed, not recorded; must be renewed every year. The two preceding sections propose to extend the law to all personal property. The following section is the existing law. One or the other will be finally omitted:

SEC. —. A personal mortgage may be made on the following property, to secure the payment of just indebtedness:

1. Upholstery and furniture used in hotels and public boarding houses.
2. Saw mill, grist mill and steamboat machinery.
3. Tools and machinery used by machinists, foundrymen and other mechanics.
4. Steam boilers, steam engines, locomotives, engines and the rolling stock of railroads.
5. Printing presses and other printing materials.
6. Instruments and chests of a surgeon, physician or dentist.
7. Libraries of all persons.
8. Machinery and apparatus for mining purposes.
9. Growing crops.

"Chattel Mortgages," Sec. 1. The last subdivision is from "Fraudulent Conveyances," Sec. 17.

This section may be substituted for the two preceding; the remaining sections can readily be adapted to it.

How created

SEC. 2959. A personal mortgage can only be created by a written instrument, and with the same formalities required to create a mortgage on real property.

Power of  
attorney to  
execute.

SEC. 2960. A power of attorney to execute a personal mortgage must be in writing, subscribed, acknowledged or proved, certified and recorded, in like manner as powers of attorney for grants of real property.

Form of.

SEC. 2961. A personal mortgage may be made in substantially the following form:

ade the ——— day of ———, in the B., of ———, by occupation a ———, ., of ———, mortgagee, witnesseth: rtgageor mortgages to the mortgagee, erty], as security for the payment to rs, on [or before] the ——— day of ———, with interest thereon [or, as ment of a note or obligation, *describ- rtgage* is executed in good faith, and or defraud creditors.

*is to be given, add.]* II. That in case of the non-payment of the principal sum, or of any part of the interest thereon, when due, the mortgagee may enter upon any place where the said property is situated, and sell the property above described, in the manner prescribed by the CIVIL CODE and the CODE OF CIVIL PROCEDURE of this State, and apply the proceeds of such sale to the satisfaction of the amount due under this mortgage, and of the expenses of the sale; the residue to be forthwith paid to the mortgageor.

*[If the interest clause is to be inserted, add.]* III. That, if the interest upon the principal sum mentioned herein is not fully paid as it falls due, the entire principal shall become immediately payable, at the option of the mortgagee.

*[If the insurance clause is to be inserted, add.]* IV. That the mortgageor shall, at his own expense, keep the said property insured against [fire] in a reputable insurance office, for the benefit of the mortgagee, to the extent of ——— dollars, until this mortgage is paid or otherwise extinguished.

Witnessed by:

E—— F——.

Executed by:

A—— B——.

N. Y. C. C., "Schedule."

Sec. 2962. A personal mortgage, before it can be recorded, must be acknowledged, or proved, certified and recorded, in like manner with real mortgages. Must be authenticated.

*NOTE.*—This takes the place of an affidavit. Ample penal sections must be prepared for the Penal Code, to supply a punishment for fraudulent mortgage equal to that for perjury. The change is made to give uniformity and similarity to real and personal mortgages.

Sec. 2963. A personal mortgage must be recorded in the office of the County Recorder of the county or counties where the property, or parts thereof, is respectively located or used, or in which it is removed. It must be recorded, also, in the county where the mortgageor re- Must be recorded.

sides, if a resident of this State. A certified copy of a personal mortgage, once recorded, may be recorded in any other county.

[New section.]

Other sections on recording made applicable.

SEC. 2964. The provisions of Sec. 1218 are applicable to the recording of a personal mortgage.

[New section.]

Recorded in different places.

SEC. 2965. A single personal mortgage, embracing several things of such character or so situated that, by the provisions of this article, separate recording would be required in different places, is only valid in respect to the things and places as to which it is duly recorded.

N. Y. C. C., Sec. 1637.

Time allowed for travel to Recorder's office.

SEC. 2966. The mortgagee in a personal mortgage is allowed, from the date of the mortgage, one day for every twenty miles of the distance between his residence and the County Recorder's office where such mortgage ought by law to be recorded. During such time the mortgage shall have the same effect as if recorded.

[New section.] Based on "Chattel Mortgages," Sec. 7.

NOTE.—This section should either be omitted or extended to all real instruments and real mortgages.

Property in transit exempt.

SEC. 2967. Property *in transitu* from the possession of the mortgagee to the county of the residence of the mortgageor, or to a location for use, shall, during a reasonable time for such transportation, be considered as located in any county where it is recorded.

Stats. 1857, 347, Sec. 2.

Property of common carrier, where recorded.

SEC. 2968. A mortgage of property used in conducting the business of a common carrier must be recorded in the county where the principal office or place of business of such carrier is located; and such recording shall operate to protect the mortgage in all counties, as against creditors, subsequent purchasers and encumbrancers, to the same extent as if the mortgage was recorded in all counties.

[New section.]

Property exempt from operation of the mortgage, when

SEC. 2969. Except as provided in Secs. 2967 and 2968, personal property, mortgaged within the provisions of

. from the operation of the mortgage moved by the mortgageor from the mortgage is recorded, or when per- of such county, when otherwise re- ration of a reasonable time for its ne is taken as a pledge, as provided

mortgageor voluntarily removes the Same.  
into a county wherein the mortgage  
luntarily permits it to remain there  
the mortgagee may take posses- ion  
dispose of it as a pledge for the pay-  
ugh such debt is not due.

onal mortgage ceases to be valid, Same.  
of the mortgageor, and subsequent  
rancers in good faith, after the ex-  
ths from the time the money is due,  
ortgage, unless within such three  
are commenced to foreclose the lien.  
n requires a new mortgage.

ecording of a personal mortgage, in Recorded  
mortgage.  
notice.  
ovisions of this article, operates as  
reditors, subsequent purchasers and

C., Sec. 1633.

sonal mortgage is void as against Personal  
mortgage,  
how satisfied  
on record.  
tgageor, and subsequent purchasers  
f the property in good faith and for  
orded, or accompanied by an imme-  
ollowed by an actual and continued

C. C., Sec. 1634; "Fraudulent Conveyances,"  
. 15.

sonal mortgage may be satisfied on How satis-  
fied.  
anner as mortgages of real property.  
, 2951, apply to personal mortgages.

Mortgagee  
may fore-  
close.

SEC. 2975. A mortgagee of personal property, when the debt for which it is given is due, may foreclose the mortgageor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the Title on *Pledge*, or by proceedings under the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1633.

Creditors of  
mortgageor,  
remedy.

SEC. 2976. A creditor of a mortgageor of personal property, by a proper action in the District Court, may subject the interest of the mortgageor to the payment of debts due such creditor. In such cases the Court may decree the payment of the secured debt before maturity, issue injunctions, establish priority of liens and decree sales, in like manner as in other civil cases. In such case the burden is upon the mortgageor or mortgagee to show that the mortgage, and the debt secured by it, were created in good faith, for value, and not to hinder, delay or defraud creditors.

[New section.] NOTE.—This last clause is a hard rule, which, when stated in another form, is, that “the mortgage is presumed to be fraudulent, but the parties may show good faith.” This is better than the existing law, which makes it *conclusively* fraudulent and void.

Creditors of  
mortgagee,  
remedy.

SEC. 2977. A creditor of a mortgagee of personal property has remedies against the interest of the mortgagee in the mortgaged property and debt, as provided by the CODE OF CIVIL PROCEDURE.

[New section.]

Does not ap-  
ply to ships.

SEC. 2978. This article does not apply to any mortgage of a ship or part of a ship, which is required by Act of Congress to be filed or recorded in any other manner.

NOTE.—By Act of Congress of July 29th, 1850 (9 U. S. Stat. at L., 440), it was provided “that no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person (other than the grantor or mortgageor, his heirs and devisees, and persons having actual notice thereof), unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of the Customs where such vessel is registered or enrolled.



## CHAPTER III.

## PLEDGE.

**SECTION 2986.** Pledge, what.

- 2987. When contract is to be deemed a pledge.
- 2988. Delivery essential to validity of pledge.
- 2989. Increase of thing.
- 2990. Lienor may pledge property to extent of his lien.
- 2991. Real owner cannot defeat pledge of property transferred to apparent owner for purpose of pledge.
- 2992. Pledge lender, what.
- 2993. Pledge holder, what.
- 2994. When pledge lender may withdraw property pledged.
- 2995. Obligations of pledge holder.
- 2996. Pledge holder must enforce rights of pledgee.
- 2997. Obligation of pledgee and pledge holder, for reward.
- 2998. Gratuitous pledge holder.
- 2999. Debtor's misrepresentation of value of pledge.
- 3000. When pledgee may sell.
- 3001. When pledgee must demand performance.
- 3002. Notice of sale to pledgeor.
- 3003. Waiver of notice of sale.
- 3004. Waiver of demand.
- 3005. Sale must be by auction.
- 3006. Pledgee's sale of securities.
- 3007. Sale on the demand of the pledgeor.
- 3008. Surplus to be paid to pledgeor.
- 3009. Same.
- 3010. Pledgee's purchase of property pledged.
- 3011. Pledgee may foreclose right of redemption.

**Sec. 2986.** Pledge is a deposit of personal property by way of security for the performance of another act. Pledge, what.

**NOTE.**—Our statute on "Pawnbrokers" will be found, a little condensed, in the form of a note at the end of this chapter. It can be substituted, if thought best, for this, which is a copy from the New York Civil Code.

**Sec 2987.** Every contract by which the possession of personal property is transferred, as a security only, is to be deemed a pledge. When contract is to be deemed a pledge.

It is intended, by this section, to place every mortgage of personal property, accompanied by a change of possession, upon the same footing with a pledge. This is in accordance with the rule of the civil law, and will greatly simplify the law of this State in respect to pledges and mortgages (see Story Eq. Jur., Sec. 1005; Code Napoleon, 2071, 2117).

N. Y. C. C., Sec. 1648.

Delivery  
essential to  
validity of  
pledge.

SEC. 2988. The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge holder, as hereafter prescribed.

N. Y. C. C., Sec. 1649.

Increase of  
thing.

SEC. 2989. The increase of property pledged is pledged with the property.

N. Y. C. C., Sec. 1650.

Lienor may  
pledge prop-  
erty to ex-  
tent of his  
lien.

SEC. 2990. One who has a lien upon property may pledge it to the extent of his lien.

This power is not fully recognized by our existing law; but it is established in England, and seems just.

N. Y. C. C., Sec. 1651.

Real owner  
cannot de-  
feat pledge  
of property  
transferred  
to apparent  
owner for  
purpose of  
pledge.

SEC. 2991. One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value

This section is an extension of our present rule allowing a pledge by an agent intrusted with indicia of title to be sustained in favor of one who lends upon it without notice of the true owner's title.

N. Y. C. C., Sec. 1652.

Pledge lend-  
er, what.

SEC. 2992. Property may be pledged as security for the obligation of another person than the owner, and in so doing the owner has all the rights of a pledgeor for himself, except as hereinafter stated.

N. Y. C. C., Sec. 1653.

Pledge hold-  
er, what.

SEC. 2993. A pledgeor and pledgee may agree upon a third person with whom to deposit the property pledged; who, if he accepts the deposit, is called a pledge holder.

N. Y. C. C., Sec. 1654.

When pledge  
lender may  
withdraw  
property  
pledged.

SEC. 2994. One who pledges property as security for the obligation of another, cannot withdraw the property pledged otherwise than as a pledgeor for himself might; and, if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent.

N. Y. C. C., Sec. 1655.

Obligations  
of pledge  
holder.

SEC. 2995. A pledge holder for reward cannot exonerate himself from his undertaking; and a gratuitous

## VIL CODE.

only by giving reasonable  
pledgee to appoint a new  
heir failure to agree, by de  
with some impartial pers  
a reasonable compensation

., Sec. 1656.

holder must enforce all th  
authorized by him to waiv

., Sec. 1657.

se, or a pledge holder for  
nd liabilities of a deposit

., Sec. 1658.

alous pledge holder assumes  
gratuitous depositary.

., Sec. 1659.

, debtor has obtained cred  
a fraudulent misrepresent  
pledged by or for him, the  
pledge to correspond with t  
efault thereof may recover  
, be not actually due.

., Sec. 1660.

performance of the act for  
s, in whole or in part, the  
due to him by a sale of  
e rules and exceptions he

l., Sec. 1661.

property pledged may be  
the act for which it is se  
demand performance ther

l., Sec. 1662.

gee must give actual notic  
and place at which the  
t such a reasonable time b  
pledgeor to attend.

l., Sec. 1663.

Waiver of  
notice of  
sale.

SEC. 3003. Notice of sale may be waived by a pledgeor at any time; but is not waived by a mere waiver of demand of performance.

N. Y. C. C., Sec. 1664.

Waiver of  
demand.

SEC. 3004. A debtor or pledgeor waives a demand of performance as a condition precedent to a sale of the property pledged, by a positive refusal to perform, after performance is due; but cannot waive it in any other manner except by contract.

N. Y. C. C., Sec. 1665.

Sale must be  
by auction.

SEC. 3005. The sale by a pledgee, of property pledged, must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price.

It is of course to be understood that this section may be overruled by agreement of the parties.

N. Y. C. C., Sec. 1666.

Pledgee's  
sale of secu-  
rities.

SEC. 3006. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of Governments, States or corporations; but he may collect the same when due.

Of course a different agreement may be made by the parties.

N. Y. C. C., Sec. 1667.

Sale on the  
demand of  
the pledgeor.

SEC. 3007. Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgeor may require it to be sold, and its proceeds to be applied to such satisfaction, when due.

This provision is new, or, at least, it is very doubtful whether such a right now exists. But its justice is very clear (Story Bailm., Sec. 320). It is not proposed to extend the same privilege to mortgages, as they are used as permanent securities. A pledge should be used only as a transient security.

N. Y. C. C., Sec. 1668.

Surplus to  
be paid to  
pledgeor.

SEC. 3008. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgeor, on demand

N. Y. C. C., Sec. 1669.

1 property pledged is sold before the Same.  
 2 is due, he may retain out of the pro-  
 3 possibly become due under his claim,  
 4; with the proper rebate of interest.  
 C. C., Sec. 1670.

Sec. 3010. A pledgee, or pledge holder, cannot pur- Pledgee's  
 chase the property pledged except by direct dealing with purchase  
 of property  
 pledged.  
 edgeor.

Story on Bailm., Sec. 319; see also *Dykens vs. Allen*, 7  
 Hull, 497, and the Title on *Trusts*. But (prior to Laws of  
 1857, Chap. 414, somewhat enlarging the powers of a special  
 partner) it was held that a special partner of a firm with  
 whom property is pledged is not incapacitated from purchas-  
 ing it at a sale made by the firm. As he was prohibited  
 from transacting any business on account of the partner-  
 ship, and could not be employed as agent, attorney or oth-  
 erwise, no duty devolved upon him in reference to the bail-  
 ment. He could not aid or direct in the sale; and, hence, was  
 not within the rule that one shall not be permitted to pur-  
 chase who has a duty inconsistent with the character of  
 purchaser (*Lewis vs. Graham*, 4 Abb. Pr., 106).

N. Y. C. C., Sec. 1671.

1. 3011. Instead of selling property pledged, as Pledgee may  
 before provided, a pledgee may foreclose the right foreclose  
 right of re-  
 demption by a judicial sale under the direction of a demption.  
 etent Court; and in that case may be authorized by  
 ourt to purchase at the sale.

N. Y. C. C., Sec. 1672.

NOTE.—The following is our statute on "Pawnbrokers"  
 (Stats. 1861, 184):

SECTION 1. Every person carrying on the business of a  
 pledgee, in this State, must keep a register, wherein must be  
 entered, in the English language, the date, duration, amount,  
 and rate of interest, of every loan made by him, an accu-  
 rate account and description of the property pledged, and  
 the name and residence of the pledgeor, and, at the same  
 time, deliver to the pledgeor a written or printed memoran-  
 dum signed by him, containing a copy of the entry, and  
 must also keep an account of all sales made by him.

SEC. 2. The rate of interest which may be charged by  
 any pledgee shall not exceed four per cent. per month, in  
 advance, on all loans exceeding twenty dollars, which shall  
 include all charges for discount, commissions, storage,  
 brokerage, wastage, and all charges. The interest must not  
 be compounded.

SEC. 3. Any pledgee who charges or receives any inter-  
 est greater than four per cent. per month, or attempts to  
 increase the interest by charging commissions, discount,  
 brokerage, storage, wa-tage or other charge, or shall com-  
 pound the interest, forfeits three times the value of the  
 article pledged, or to be pledged, to be recovered by the  
 owner or pledgeor in a civil action.

SEC. 4. No pledgee must sell or dispose of any article  
 pledged to him and unredeemed, until it has remained in

his possession six months after the last day of redemption and all such sales must be at public auction, upon notice of five days, published in some newspaper printed at the place where the sale takes place; and if no newspaper is there printed, then by posting notices in two public places, five days before the sale, giving the place where the articles will be sold, and a list of the articles, which sales must, in all cases, take place in the town or city where such articles are pledged.

SEC. 5. After deducting from the proceeds of any sale the amount of the loan, the interest then due, and four per cent. on the loan additional for the expense of the sale, the pledgee must pay the balance to the person entitled to redeem the property if no sale had been made, and if not so paid on demand, three times the amount thereof shall be forfeited, to be recovered by the owner or pledgeor in a civil action.

SEC. 6. Every pledgee must exhibit his register, and all articles received by him in pledge, and his account of sales, to any Sheriff, Constable or police officer, possessing the necessary writ or warrant to search for personal property.

See Secs. 338 to 343, inclusive, Penal Code, and compare with them.

## CHAPTER IV.

### BOTTOMRY.

SECTION 3017. Bottomry, what.

3018. Owner of ship may hypothecate.

3019. When master may hypothecate ship.

3020. Same.

3021. When master may hypothecate freight money.

3022. Rate of interest.

3023. Rights of lender, when no necessity for bottomry existed.

3024. Stipulation for personal liability void.

3025. When money loaned is to be repaid.

3026. When bottomry loan becomes due.

3027. Bottomry lien, how lost.

3028. Preference of bottomry lien over other liens.

3029. Priority of bottomry liens.

Bottomry,  
what.

SEC. 3017. Bottomry is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage or period.

N. Y. C. C., Sec. 1673.

Owner of  
ship may  
hypothecate.

SEC. 3018. The owner of a ship may hypothecate it or its freightage, upon bottomry, for any lawful purpose and at any time and place.

N. Y. C. C., Sec. 1674.

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a ship may hypothecate for the purpose of procuring money for accomplishing repairs, or for securing the safety of the cargo.

5.

a ship can hypothecate upon bottomry, only when he cannot otherwise obtain the necessities of the ship, and is unable to raise adequate funds of the owner, or to obtain any upon the personal credit of the owner, and when previous communication with him is precluded by the urgent necessities of the case.

N. Y. C. C., Sec. 1676.

Sec. 3021. The master of a ship may hypothecate freightage upon bottomry, under the same circumstances as those which authorize an hypothecation of the ship.

N. Y. C. C., Sec. 1677.

Sec. 3022. Upon a contract of bottomry, the parties may lawfully stipulate for a rate of interest higher than that allowed by the law upon other contracts. But the competent Court may reduce the rate stipulated, if it appears unjustifiable and exorbitant.

N. Y. C. C., Sec. 1678.

Sec. 3023. A lender upon a contract of bottomry by the master of a ship, as such, may enforce the contract, although the circumstances necessary to authorize the master to hypothecate the ship did not in fact exist, if, by due diligence and inquiry, the lender had reasonable grounds to believe, and did in good faith believe in the existence of such circumstances.

N. Y. C. C., Sec. 1679.

Sec. 3024. A stipulation in a contract of bottomry imposing any liability for the loss independent of maritime risks, is void.

N. Y. C. C., Sec. 1680.

Sec. 3025. In case of a total loss of the thing hypothecated, from a risk to which the loan was subject, the lender upon bottomry can recover nothing; in case of a partial loss, he can recover the amount of the loan.

partial loss, he can recover only to the extent of the net value to the owner of the part saved.

N. Y. C. C., Sec. 1681.

When bottomry loan becomes due.

SEC. 3026. Unless it is otherwise expressly agreed, a bottomry loan becomes due immediately upon the termination of the risk, although a term of credit is specified in the contract.

N. Y. C. C., Sec. 1682.

Bottomry lien, how lost.

SEC. 3027. A bottomry lien is independent of possession, and is lost by omission to enforce it within a reasonable time.

N. Y. C. C., Sec. 1683.

Preference of bottomry liens over other liens.

SEC. 3028. A bottomry lien, if created out of a real or apparent necessity, in good faith, is preferred to every other lien or claim upon the same thing, excepting only a lien for seamen's wages, a subsequent lien of materialmen for supplies or repairs indispensable to the safety of the ship, and a subsequent lien for salvage.

N. Y. C. C., Sec. 1684.

Priority of bottomry liens.

SEC. 3029. Of two or more bottomry liens on the same subject, the latter in date has preference, if created out of necessity.

N. Y. C. C., Sec. 1685.

## CHAPTER V.

### RESPONDENTIA

SECTION 3036. Respondentia, what.

3037. Respondentia by owner.

3038. Respondentia by master.

3039. Rate of interest.

3040. Obligations of ship owner.

Respondentia, what.

SEC. 3036. Respondentia is a contract by which a cargo, or some part thereof, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks.

N. Y. C. C., Sec. 1686.



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## TER VI.

### LIENS.

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- SECTION 3062. Banker's lien.  
 3063. Shipmaster's lien.  
 3064. Seamen's lien.  
 3065. Officer's lien.  
 3066. Attorneys' lien.  
 3067. Judgment lien.  
 3068. Mechanic's lien.  
 3069. Lien on ships.  
 3070. Enforcement of lien.

Lien of seller of real property.

SEC. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

N. Y. C. C., Sec. 1691.

When transfer of contract waives lien.

SEC. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract, by the seller, waives his lien to the extent of the sum payable under the contract.

*Hallock vs. Smith*, 3 Barb., 267. A transfer in trust to pay debts, and return the surplus, does not waive the lien. (Id.)

N. Y. C. C., Sec. 1692.

Extent of seller's lien.

SEC. 3048. The liens defined in Secs. 3046 and 3050 are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value.

*Hallock vs. Smith*, 3 Barb., 267; *Champion vs. Brown*, 6 Johns. Ch., 598.

*Warren vs. Fenn*, 28 Barb., 333; *Burlingame vs. Robbins*, 21 id., 327; *Shirley vs. Congress*, etc.; *Refinery*, 2 Edw., 505. But compare *Bayley vs. Greenleaf*, 7 Wheat., 46.

N. Y. C. C., Sec. 1693.

Lien of seller of personal property.

SEC. 3049. One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price.

N. Y. C. C., Sec. 1694.

Purchaser's lien on real property.

SEC. 3050. One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid

as he may be entitled to recover back, in case of a failure of consideration.

N. Y. C. C., Sec. 1695.

SEC. 3051. Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service.

Lien for services.

N. Y. C. C., Sec. 1696.

SEC. 3052. A person who makes, alters or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two months after the work is done, the person may proceed to sell the property at public auction, by giving ten days public notice of the sale by advertising in some newspaper published in the county in which the work was done; or, if there be no newspaper published in the county, then by posting up notices of the sale in three of the most public places in the town where the work was done, for ten days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; the remainder, if any, must be paid over to the owner thereof.

Liens on personal property.

Stats. 1863, 589, Sec. 15 (Act for securing liens of mechanics and others).

SEC. 3053. An innkeeper is the keeper of a house of public entertainment, and who provides accommodation for travellers and sojourners.

Innkeeper, definition of.

[New section.]

SEC. 3054. An innkeeper has a specific lien upon the goods brought to the inn by his guest, for the price of the lodgings and supplies furnished to him, subject to rules prescribed in the next five sections.

Innkeeper's lien, what it extends to, generally.

SEC. 3055. It is not measured by the supposed necessity or propriety of the supplies for the price of which it

Not measured by propriety of supplies.

arises, if the guest is possessed of his reason and is not an infant.

Goods must be delivered and received in character of guest and innkeeper.

SEC. 3056. It arises only when the goods come to the hands of the innkeeper in that character from a person who is then his guest; and will not arise by reason that the person who brings the goods afterwards becomes a guest, irrespective of the contract under which the goods were received.

Extends only to goods which innkeeper is bound to receive.

SEC. 3057. It extends to such only of the goods brought by the guest as the innkeeper, in the performance of his duty to the public, is bound to receive, but it does not extend to the clothes on the person.

Extends to stolen property.

SEC. 3058. It extends to property brought by, but not belonging to the guest, though it be stolen, if the innkeeper at the time of the deposit had no notice of the unlawful possession, or of the title of the real owner.

Extends to horses.

SEC. 3059. It extends to horses brought by the owner as a guest to the inn, though they be occasionally removed, if the removal be with an intention to return them, and no new contract is established.

Boarding-house keeper included as innkeeper.

SEC. 3060. • A boarding-house keeper is an innkeeper, and his lien an innkeeper's lien, within the meaning of the preceding sections.

[New section.]

NOTE.—There is no small subject upon which a distinct declaration of the law will be more useful than that upon the *rights of innkeepers*. The necessity of acting promptly; the danger of illegally delaying or annoying the travelling community, and the danger of losing just dues, makes it necessary that every traveller and innkeeper should be familiar with the law governing the relation.

SECS. 3054 to 3059, inclusive, with but slight changes, have been taken from a *specimen article* on the subject, prepared by R. W. Fisher, author of the work on *Mortgages*, and submitted to the Lord Chancellor with a letter on the subject of the codification of the Common Law. See SECS. 1859 and 1860 of this Code.

Lien of factor.

SEC. 3061. A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal.

N. Y. C. C., Sec. 1697.

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er has a general lien, dependent upon property in his hands belonging to him by advance due to him from such business.

N. Y. C. C., Sec. 1698.

**Sec. 3063.** The master of a ship has a general lien, independent of possession, upon the ship and freight for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but no lien for his wages.

N. Y. C. C., Sec. 1699.

**Sec. 3064.** The mate and seamen of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to other lien.

N. Y. C. C., Sec. 1700.

**Sec. 3065.** An officer who levies an attachment upon personal property acquires a special lien dependent on possession, upon such property, which authorizes him to hold it until the process is discharged, satisfied, or a judicial sale of the property is had.

N. Y. C. C., Sec. 1701.

**Sec. 3066.** An attorney at law has a lien, which is defined and regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1702.

NOTE.—See Sec. 520 (N. Y. C. C.) of the Code, complete.

**Sec. 3067.** The lien of a judgment is regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1703.

**Sec. 3068.** The liens of mechanics, for material and services upon real property, are regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1704.

NOTE.—Nearly the whole chapter on *Mechanics'* Code of Civil Procedure, commencing with Sec. 111 to be re-examined and transferred to this Code.

Lien on  
ships.

SEC. 3069. Debts amounting to at least fifty dollars, contracted for the benefit of ships, are liens in the cases provided by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1705.

NOTE.—The reference is to the New York Code of Civil Procedure, as reported complete.

Enforce-  
ment of lien.

SEC. 3070. The mode of proceeding by a creditor to enforce a lien within this State is regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1706.

NOTE.—New York Code, as reported complete.

## CHAPTER VII.

### STOPPAGE IN TRANSIT.

SECTION 3076. When consignor may stop goods.

3077. What is insolvency of consignee.

3078. Transit, when ended.

3079. Stoppage, how effected.

3080. Effect of stoppage.

When con-  
signor may  
stop goods.

SEC. 3076. A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof.

N. Y. C. C., Sec. 1707.

What is  
insolvency  
of consignee.

SEC. 3077. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so.

N. Y. C. C., Sec. 1708.

Transit,  
when ended.

SEC. 3078. The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee.

N. Y. C. C., Sec. 1709.

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## E X V.

### INSTRUMENTS.

INSTRUMENTS IN GENERAL.  
CHANGE.  
NOTES.

#### AND CERTIFICATES

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## CHAPTER I.

### INSTRUMENTS IN GENERAL.

#### DEFINITIONS.

NOTION.

1.

FOR PAYMENT.

#### PRESENTMENT AND NOT

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### ARTICLE I.

#### DEFINITIONS.

Is this Title is applicable  
not, what.

**SECTION 3088.** Must be for unconditional payment of money.

3089. Payee.

3090. Instrument may be in alternative.

3091. Date, etc.

3092. May contain a pledge, etc.

3093. What it must not contain.

3094. Date.

3095. Different classes of negotiable instruments.

To what  
instruments  
this Title is  
applicable.

**SEC. 3086.** The provisions of this Title apply only to negotiable instruments, as defined in this article.

N. Y. C. C., Sec. 1712.

Negotiable  
instrument,  
what.

**SEC. 3087.** A negotiable instrument is a written promise or request for the payment of a certain sum of money [to a person, or] to order or bearer, in conformity to the provisions of this article.

N. Y. C. C., Sec. 1713.

**NOTE.**—Words in brackets, “to a person, or,” inserted on authority of Sec. 1, “Bills of Exchange and Promissory Notes” (Hittell).

Must be for  
uncondition-  
al payment  
of money.

**SEC. 3088.** A negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment.

N. Y. C. C., Sec. 1714.

Payee.

**SEC. 3089.** The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.

N. Y. C. C., Sec. 1715.

Instrument  
may be in  
alternative.

**SEC. 3090.** A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act; but as to the latter, the instrument is not within the provisions of this Title.

N. Y. C. C., Sec. 1716.

Date, etc.

**SEC. 3091.** A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.

N. Y. C. C., Sec. 1717.

**NOTE.**—The words “with or without seal” struck out as seals are abolished by this Code.

May contain  
a pledge,  
etc.

**SEC. 3092.** A negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof.

N. Y. C. C., Sec. 1718.



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"to bearer," or words equivalent thereto, is in the two former cases payable to the written order of such person, and in the latter case, payable to the bearer.

N. Y. C. C., Sec. 1724.

Unindorsed  
note, when  
negotiable.

SEC. 3102. A negotiable instrument, made payable to the order of the maker, or of a fictitious person, if issued by the maker for a valid consideration, without indorsement, has the same effect against him and all other persons having notice of the facts, as if payable to the bearer.

N. Y. C. C., Sec. 1725.

Fictitious  
payee.

SEC. 3103. A negotiable instrument, made payable to the order of a person obviously fictitious, is payable to the bearer.

N. Y. C. C., Sec. 1726.

Presumption  
of considera-  
tion.

SEC. 3104. The signature of every drawer, acceptor and indorser of a negotiable instrument, is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business.

N. Y. C. C., Sec. 1727.

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### ARTICLE III.

#### INDORSEMENT.

SECTION 3108. Indorsement, what.

3109. Agreement to indorse.

3110. When may be made on separate paper.

3111. Kinds of indorsement.

3112. General indorsement, what.

3113. Special indorsement, what.

3114. General indorsement, how made special.

3115. Destruction of negotiability by indorser.

3116. Implied warranty of indorser.

3117. Indorser, when liable to payee.

3118. Indorsement without recourse.

3119. Same.

3120. Indorsee privy to contract.

3121. Indorser has rights of guarantor.

3122. Rights of accommodation indorser.

3123. Effect of want of consideration.

3124. Indorsee in due course, what.

3125. Rights of indorsee in due course.

3126. Instrument left blank.



1. That it is in all respects what it purports to be.
2. That he has a good title to it.
3. That the signatures of all prior parties are binding upon them.
4. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay so much of the same as the holder paid therefor, with interest; unless exonerated under the provisions of Secs. 3189, 3248 or 3255.

N. Y. C. C., Sec. 1736.

Indorser,  
when liable  
to payee.

SEC. 3117 One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon, as an indorser.

This is the substance of the decision in *Moore vs. Cross*, 19 N. Y., 227. But previous cases have so complicated the question that it is necessary to clear up the confusion by a positive rule. It has long been maintained that an indorser, before delivery to the payee, does not mean to be responsible to him, and though this doctrine is now overruled, yet the decision is put upon grounds that are needlessly technical.

N. Y. C. C., Sec. 1737.

Indorsement  
without  
recourse.

SEC. 3118. An indorser may qualify his indorsement with the words, "without recourse," or equivalent words; and upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement.

N. Y. C. C., Sec. 1738.

Same.

SEC. 3119. Except as otherwise prescribed by the last section, an indorsement without recourse has the same effect as any other indorsement.

N. Y. C. C., Sec. 1739.

Indorsee  
privy to  
contract.

SEC. 3120. An indorsee of a negotiable instrument has the same rights against every prior party thereto, that he would have had if the contract had been made directly between them in the first instance.

See *Griswold vs. Haven*, 25 N. Y., 595 ; *Polhill vs. Walter*, 3 B. & Ad., 114. This principle is one of great importance, particularly with reference to representations contained in commercial paper, which are deemed to be made directly to every indorsee.

N. Y. C. C., Sec. 1740.

Indorser has  
rights of  
guarantor.

SEC. 3121. An indorser has all the rights of a guarantor, as defined by the chapter on *Guaranty in General*, and is exonerated from liability in like manner.

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Thus an extension of time granted to the principal discharges an indorser (*Platt vs. Stark*, 2 Hilt., 31 vs. *Jenkins*, 1 id., 73; *Wood vs. Jefferson Co. Ban* 194; *Hubbly vs. Brown*, 16 Johns., 70; *Myers v* 5 Hill, 463; *Dundas vs. Sterling*, 6 Penn. St., 73 vs. *Mason*, 6 Mass., 85; *Moss vs. Hall*, 6 Exch., release of an indorser discharges subsequent indorser *comb vs. Raynor*, 21 Wend., 108).

An indorser in the ordinary course of business has rights of a surety (*Pitta vs. Congdon*, 2 N. Y., 3 vs. *Little*, 12 Mass., 508; see *Pring vs. Clarke* C., 14).

N. Y. C. C., Sec. 1741.

Sec. 3122. One who indorses a negotiable instrument at the request and for the accommodation of a party to the instrument, has all the rights of a surety defined by the chapter on *Suretyship*, and is exonerated in like manner, in respect to every one having notice of the facts, except that he is not entitled to contribution against subsequent indorsers.

N. Y. C. C., Sec. 1742.

Sec. 3123. The want of consideration for the taking of a maker, acceptor or indorser of a negotiable instrument, does not exonerate him from liability to an indorsee in good faith for a consideration.

N. Y. C. C., Sec. 1743.

Sec. 3124. An indorsee in due course is one who takes in good faith, in the ordinary course of business, for value, before its apparent maturity or presumptive honor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

N. Y. C. C., Sec. 1744.

Sec. 3125. An indorsee of a negotiable instrument in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.

N. Y. C. C., Sec. 1745.

NOTE.—Sec. 368, Code of Civil Procedure, must be construed to harmonize with this subject; also with Sec. 3125 of this Code. See, also, *Vinton vs. Crowe*, 4 Cal

Instrument  
left blank.

SEC. 3126. One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.

N. Y. C. C., Sec. 1746.

#### ARTICLE IV.

##### PRESENTMENT FOR PAYMENT.

SECTION 3130. Effect of want of demand on principal debtor.

3131. Presentment, how made.

3132. Apparent maturity, when.

3133. Presumptive dishonor of bill, payable after sight.

3134. Apparent maturity of bill, payable at sight.

3135. Apparent maturity of note.

3136. Same.

3137. Surrender of instrument, when a condition of payment.

Effect of  
want of de-  
mand on  
principal  
debtor.

SEC. 3130. It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.

N. Y. C. C., Sec. 1747.

Present-  
ment, how  
made.

SEC. 3131. Presentment of a negotiable instrument for payment, when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable:

1. The instrument must be presented by the holder.

2. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person of discretion, if one can be found there; and if not, then it must be presented to a Notary Public within the State.

3. An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found therein.

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which does not specify a place for its presentation at the place of residence or of the debtor, or wherever he may be the presentor; and, must be presented upon the day of maturity, or, if it is payable on demand, at any time before its apparent maturity, within reasonable hours, and, if it is payable at a banking house, within the usual banking hours of the vicinity; but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day.

N. Y. C. C., Sec. 1748.

Sec. 3132. The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due; or, when that is a holiday, the next business day.

*Salter vs. Burt*, 20 Wend., 205; see *Campbell vs. International Assurance Company*, 4 Bosw., 298. If the recommendation of the Commissioners in regard to days of grace is not adopted (see Sec. 1751), it will be necessary to add to this section: "The usual days of grace are to be added."

N. Y. C. C., Sec. 1749.

Sec. 3133. A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.

It is very desirable that the term at the end of which a bill may be presumed to be dishonored should be fixed. The decisions are conflicting and unsatisfactory. The Commissioners have simply suggested periods which seem reasonable, but do not attach any importance to the particular terms proposed.

N. Y. C. C., Sec. 1750.

Sec. 3134. The apparent maturity of a bill of exchange, payable at sight or on demand, is—

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

N. Y. C. C., Sec. 1751.

Sec. 3135. The apparent maturity of a promissory note, payable at sight or on demand, is—

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, six months after its date.

It is doubtful whether a demand note bearing interest has any "apparent maturity," unless it is known to be dishonored (see *Merritt vs. Todd*, 23 N. Y., 28; *Brooks vs. Mitchell*, 9 M. & W., 15; *Wethey vs. Andrews*, 3 Hill, 582; compare *Sice vs. Cunningham*, 1 Cow., 397; *Loose vs. Dunkin*, 7 Johns., 70).

N. Y. C. C., Sec. 1752.

Same.

SEC. 3136. Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last section.

N. Y. C. C., Sec. 1753.

Surrender of instrument, when a condition of payment.

SEC. 3137. A party to a negotiable instrument may require, as a condition concurrent to its payment by him—

1. That the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or,

2. If the holder has a right to retain the instrument, and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or,

3. If the instrument is lost, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon; or,

4. If the instrument is destroyed, then that proof of its destruction be given to him.

N. Y. C. C., Sec. 1754.

## ARTICLE V.

### DISHONOR OF NEGOTIABLE INSTRUMENTS.

SECTION 3141. Dishonor, what.

3142. Notice, by whom given.

3143. Form of notice.

3144. Notice, how served.

3145. Notice, how served after indorser's death.

3146. Notice given in ignorance of death, valid.

3147. Notice, when to be given.

3148. Notice of dishonor, when to be mailed.

3149. Notice, how given by agent.

3150. Additional time for notice by indorser.

3151. Effect of notice of dishonor.



## CIVIL CODE.

able instrument is c  
paid, or not accepted,  
tment for the purpose,  
it is excused.

, Sec. 1755.

f the dishonor of a neg

—

of; or,

he instrument who mig  
holder, and who would  
to reimbursement from  
given.

, Sec. 1756.

of dishonor may be gi  
se instrument with reas  
ly informs the party r  
s been dishonored.

., Sec. 1757.

of dishonor may be gi

1. By delivering it to the party to be charg  
lly, at any place; or,

2. By delivering it to some person of discre  
lace of residence or business of such party,  
acting for him; or,

3. By properly folding the notice, directin  
arty to be charged, at his place of residence  
o the best information that the person giving  
an obtain, depositing it in the Post-office mo  
ntly accessible from the place where the p  
was made, and paying the postage thereon.

N. Y. C. C., Sec. 1758.

Sec. 3145. In case of the death of a part  
notice of dishonor should otherwise be given  
must be given to one of his personal represen  
f there are none, then to any member of his  
resided with him at his death; or, if there is  
t must be mailed to his last place of reside  
scribed by Subd. 3 of the last section.

Modified from Story on Notes, Sec. 310  
said that notice should be left at the dom

ceased. This would often fail to reach his representatives; more often than under the rule above given.

N. Y. C. C., Sec. 1759.

Notice given  
in ignorance  
of death,  
valid.

SEC. 3146. A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

N. Y. C. C., Sec. 1760.

Notice, when  
to be given.

SEC. 3147. Notice of dishonor, when given by the holder of an instrument, or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.

N. Y. C. C., Sec. 1761.

Notice of  
dishonor,  
when to be  
mailed.

SEC. 3148. When notice of dishonor is given by mail, it must be deposited in the Post-office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place from which, for the place to which, the notice should be sent.

N. Y. C. C., Sec. 1762.

Notice, how  
given by  
agent.

SEC. 3149. When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

N. Y. C. C., Sec. 1763.

Additional  
time for  
notice of  
indorser.

SEC. 3150. Every party to a negotiable instrument, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties, as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.

N. Y. C. C., Sec. 1764.

Effect of  
notice of  
dishonor.

SEC. 3151. A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto, whose right to give the like notice has not been lost.

N. Y. C. C., Sec. 1765.

## CIVIL CODE.

### ARTICLE VI.

#### OF PRESENTMENT AND NOTICE.

of dishonor, when excused.  
presentment and notice, when excused.

when excused.  
of presentment and notice.  
of protest.

—If the provision of Sec. 3131, requiring presentment to be made to a Notary Public in certain cases, it will be necessary to insert here a section:

—The presentment of a negotiable instrument is excused—  
when neither the place of payment, if any, designated in the instrument, nor the place of residence or business of the principal debtor can, with reasonable diligence, be ascertained by the holder; or,  
when no person to whom presentment may properly be made can, with reasonable diligence, be found at the place or,  
when the instrument designates no place of payment and no person to be signed by the principal debtor at the place, and he resided therein at the time of signing and has since removed therefrom.

Notice of dishonor is excused—  
when the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or,  
when no Post-office communication between the parties can be had; or,  
when the party by whom the notice should be given cannot ascertain in which the place of residence or business of the party to be charged is situated; or,  
when the party to be charged is the same person as the party to whom the instrument is payable; or,  
when the notice is waived by the party entitled to give it.

C. C., Sec. 1766.

Presentment and notice are excused in the case of a negotiable instrument, when the holder informs the maker of the instrument, before its maturity, that it is dishonored.

C. C., Sec. 1767.

Presentment is not required before or after the maturity of an instrument when the holder has received full security for the instrument or the maker has assigned all his estate to the holder.

to him as such security, presentment and notice to him are excused.

*Mechanics' Bank vs. Griswold*, 7 Wend., 165; *Corney vs. Da Costa*, 1 Esp., 302; limited in *Seacord vs. Miller*, 13 N. Y., 55.

This rule is founded upon the same principle as the series of cases that were overthrown in *Hall vs. Newcomb*, 7 Hill, 416; and perhaps ought to share their fate. If the maker intends that the indorser shall waive notice, he will naturally so stipulate with him, or will give the security to the holder outright. The following is suggested instead of this section:

[SEC. 1768. No transactions between the maker and indorser of a negotiable instrument waive or excuse notice of dishonor to the latter, unless they so agree.]

This latter rule is established in Connecticut (*Holland vs. Turner*, 10 Conn., 308, 317).

N. Y. C. C., Sec. 1768.

Delay, when excused.

SEC. 3158. Delay in presentment, or in giving notice of dishonor, is excused, when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

N. Y. C. C., Sec. 1769.

Waiver of presentment and notice.

SEC. 3159. A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

*Buchanan vs. Marshall*, 22 Vt., 561; *Burnham vs. Webster*, 17 Me., 50.

N. Y. C. C., Sec. 1770.

Waiver of protest.

SEC. 3160. A waiver of protest on any negotiable instrument other than a foreign bill of exchange, waives presentment and notice.

*Coddington vs. Davis*, 1 N. Y., 186; 3 Den., 16.

N. Y. C. C., Sec. 1771.

## ARTICLE VII.

### EXTINCTION OF NEGOTIABLE INSTRUMENTS.

SECTION 3164. Obligation of party, when extinguished.

3165. Revival of obligation.

Obligation of party, when extinguished.

SEC. 3164. The obligation of a party to a negotiable instrument is extinguished—

1. In like manner with that of parties to contracts in general; or,

2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the

e of business, to any person having actual  
eof, and appearing, by its terms, to be en-  
ant.

See Secs. 1744 and 1745, and notes. By the commercial  
w, as recognized in England, a simple agreement to waive  
e debt created by a negotiable instrument, although with-  
it a new consideration or a seal, discharges the debtor  
'oster vs. Dawber, 6 Exch., 839; Byles on Bills, 5th ed.,  
.5). But this rule has been either overlooked or over-  
uled in this State (see Seymour vs. Minturn, 17 Johns.,  
19; Crawford vs. Mills, 13 id., 87; Smith vs. Bartholo-  
ew, 1 Metc., 275; Ruggles vs. Patten, 8 Mass., 480.)

N. Y. C. C., Sec. 1772.

If, after its extinction, a negotiable instru-  
nto the possession of an indorsee in due  
igation thereof revives in his favor.

Revival of  
obligation.

N. Y. C. C., Sec. 1773.

## CHAPTER II.

### BILLS OF EXCHANGE.

- I. FORM AND INTERPRETATION.
- II. DAYS OF GRACE.
- III. PRESENTMENT FOR ACCEPTANCE.
- IV. ACCEPTANCE.
- V. ACCEPTANCE OR PAYMENT FOR HONOR.
- VI. PRESENTMENT FOR PAYMENT.
- VII. EXCUSE OF PRESENTMENT AND NOTICE.
- VIII. FOREIGN BILLS.

#### ARTICLE I.

##### FORM AND INTERPRETATION OF A BILL.

ill of exchange, what.  
rawee, in case of need.  
ill in parts of a set.  
'hen must be in a set.  
resentment, etc., of part of set.  
ill, where payable.  
ights and obligations of drawer.

A bill of exchange is an instrument, nego-  
, by which one, who is called the drawer,

Bill of ex-  
change,  
what.

requests another, called the drawee, to pay a specified sum of money.

N. Y. C. C., Sec. 1774.

Drawee, in  
case of need.

SEC. 3172. A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

N. Y. C. C., Sec. 1775.

Bill in parts  
of a set.

SEC. 3173. A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

N. Y. C. C., Sec. 1776.

When must  
be in a set.

SEC. 3174. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.

N. Y. C. C., Sec. 1777.

Present-  
ment, etc.,  
of part of set

SEC. 3175. Presentment, acceptance, or payment, of a single part in a set of a bill of exchange, is sufficient for the whole.

N. Y. C. C., Sec. 1778.

Bill, where  
payable.

SEC. 3176. A bill of exchange is payable—

1. At the place where, by its terms, it is made payable;  
or,

2. If it specifies no place of payment, then at the place to which it is addressed; or,

3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found; or,

4. If this cannot be done, then at the office of any Notary Public in the State.

See Story on Bills, Sec. 48. This provision is new. Compare Secs. 1783 and 1748, which contain similar provisions.

N. Y. C. C., Sec. 1779.

Rights and  
obligations  
of drawer.

SEC. 3177. The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument.

N. Y. C. C., Sec. 1780.

## ARTICLE II.

## DAYS OF GRACE.

Days of grace.

Days of grace are not allowed.

Days of  
grace.

The Commissioners recommend that no grace be hereafter allowed upon commercial paper. This is the rule upon the continent of Europe. Should this recommendation not be adopted, the following should be substituted for the text: [Sec. 1781. The three days following the day on which a bill of exchange, payable otherwise than at sight or on demand, becomes due by its terms, are allowed as days of grace, unless the last of such days is a holiday, in which case the next preceding business day is the last day of grace allowed.]

N. Y. C. C., Sec. 1781.

## ARTICLE III.

## PRESENTMENT FOR ACCEPTANCE.

When a bill may be presented.

Presentment, how made.

Presentment to joint drawees.

When presentment to be made to drawee in case of need.

Presentment, when must be made.

At any time before a bill of exchange is older may present it to the drawee for acceptance; if acceptance is refused, the bill is dishonored.

When a bill  
may be pre-  
sented.

N. Y. C. C., Sec. 1782.

Presentment for acceptance must be made in proper manner, as nearly as by reasonable diligence practicable:

Present-  
ment, how  
made.

It must be presented by the holder.

It must be presented on a business day, and within the prescribed time.

It must be presented to the drawee, if he can be found in the State; and if not, then at his place of business, if within the State, to any person residing therein; and if he has no such place of residence, or there is no person of discretion known to any Notary Public in the State; and, if the drawee requests it, the bill must be left with the Notary at the same hour of the next day, to which time he must return for his acceptance or refusal.

See Story on Bills, Sec. 237; 1 R. S., 768. The clause providing for presentment to a Notary Public is new, but is in conformity to Secs. 1748 and 1779.

N. Y. C. C., Sec. 1783.

Presentment  
to joint  
drawees.

SEC. 3187. Presentment for acceptance to one of several joint drawees, and refusal by him, dispense with presentment to the others.

This question has been considered very doubtful (Story on Bills, Sec. 229), but is decided in effect by the case of Carman vs. Pultz (21 N. Y., 531).

N. Y. C. C., Sec. 1784.

When pre-  
sentment to  
be made to  
drawee in  
case of need.

SEC. 3188. A bill of exchange which specifies a drawee in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

N. Y. C. C., Sec. 1785.

Present-  
ment, when  
must be  
made.

SEC. 3189. When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.

At present the only rule established is that "due diligence" must be used (Wethey vs. Andrews, 3 Hill, 532; Smith vs. Janes, 20 Wend., 192; Robinson vs. Ames, 20 Johns., 146). But this is too indefinite.

N. Y. C. C., Sec. 1786.

#### ARTICLE IV.

##### ACCEPTANCE.

SECTION 3193. Acceptance, how made.

3194. Holder entitled to acceptance on face of bill.

3195. What acceptance sufficient with consent of holder.

3196. Acceptance by separate instrument.

3197. Promise to accept, when equivalent to acceptance.

3198. Cancellation of acceptance.

3199. What is admitted by acceptance.

Acceptance,  
how made.

SEC. 3193. An acceptance of a bill must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words.

N. Y. C. C., Sec. 1787.



The holder of a bill of exchange, if entitled  
ce thereof, may treat the bill as dishonored  
refuses to write across its face an unquali-

Holder enti-  
tled to ac-  
ceptance on  
face of bill.

3.

N. Y. C. C., Sec. 1788.

The holder of a bill of exchange may, with-  
to his rights against prior parties, receive  
sufficient acceptance—

What ac-  
ceptance suf-  
ficient with  
consent of  
holder.

tance written upon any part of the bill, or  
e paper.

tance qualified so far only as to make the  
a particular place within the city or town,  
ie acceptance was unqualified, it would be

by the drawee to return the bill to the  
resentment; in which case the bill is pay-  
ely, without regard to its terms.

This provision [for refusal to return the bill] is new, but  
seems to be no more than reasonable, the act amounting to  
conversion, for which the owner might recover damages  
the value of the bill.

N. Y. C. C., Sec. 1789.

The acceptance of a bill of exchange, by a  
ument, binds the acceptor only to one to  
een shown, and who, upon the faith thereof,  
ie for the bill.

Acceptance  
by separate  
instrument.

1 R. S., 768, Sec. 7. See *Burns vs. Robbins*, 40 Barb.,  
68. There does not seem to be any strong reason for re-  
stricting the benefit of such an acceptance to holders for  
else, as distinguished from other holders for a good con-  
sideration.

N. Y. C. C., Sec. 1790.

An unconditional promise, in writing, to ac-  
exchange, is a sufficient acceptance thereof,  
ery person to whom it has been shown, and  
e faith thereof, has given value for the bill.

Promise to  
accept, when  
equivalent to  
acceptance.

N. Y. C. C., Sec. 1791; Sec. 8, "Bills of Exchange  
and Promissory Notes" (Hittell).

The acceptor of a bill of exchange may can-  
ance at any time before delivering the bill to  
d before the holder has, with the consent of  
transferred his title to another person who  
ie for it upon the faith of such acceptance.

Cancellation  
of accept-  
ance.

N. Y. C. C., Sec. 1792.

What is  
admitted by  
acceptance.

SEC. 3199. The acceptance of a bill of exchange admits the capacity of the drawer to draw and indorse it; and if written upon the bill, it also admits the same to be genuine, and binding upon the drawer; but it does not admit the signature of any indorser to be genuine.

N. Y. C. C., Sec. 1793.

## ARTICLE V.

### ACCEPTANCE OR PAYMENT FOR HONOR.

SECTION 3203. When bill may be accepted or paid for honor.

3204. Holder of bill of exchange bound to accept payment for honor.

3205. Acceptance for honor, how made.

3206. How enforced.

3207. Notice of dishonor not excused by acceptance for honor.

When bill  
may be ac-  
cepted or  
paid for  
honor.

SEC. 3203. On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

N. Y. C. C., Sec. 1794.

Holder of bill  
of exchange  
bound to  
accept pay-  
ment for  
honor.

SEC. 3204. The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

N. Y. C. C., Sec. 1795.

Acceptance  
for honor.  
how made.

SEC. 3205. An acceptor or payer for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such parties, and from all parties prior to them.

N. Y. C. C., Sec. 1796.

How en-  
forced.

SEC. 3206. A bill of exchange, which has been accepted for honor, must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser; after which the acceptor for honor must pay the bill.

N. Y. C. C., Sec. 1797.

## II. CODE.

ance of a bill of ex  
e holder from givir  
B.

o. 1798.

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### FIGLE VI.

#### INT FOR PAYMENT.

n bill not accepted, where  
ill, payable at particular pl  
presentment in certain cas  
ses.

exchange is by its  
and is not accepted  
. at the same place f  
rment is necessary.  
ee. 1799.

exchange, accepted p  
particular place, must be presented at that pl  
ment, when presentment for payment is nec  
need not be presented elsewhere.

N. Y. C. C., Sec. 1800.

Sec. 3213. If a bill of exchange, payable  
on demand, without interest, is not duly pr  
payment within ten days after the time in wh  
with reasonable diligence, be transmitted to  
place for such presentment, the drawer and is  
exonerated, unless such presentment is excus

N. Y. C. C., Sec. 1801.

Sec. 3214. Mero delay in presenting a bill  
payable with interest, at sight or on deman  
exonerate any party thereto.

N. Y. C. C., Sec. 1802.

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### ARTICLE VII.

#### EXCUSE OF PRESENTMENT AND NOTICE.

Section 3218. Presentment, when excused.

3219. Delay, when excused.

3220. Presentment and notice, when excused.

Presentment, when excused.

**SEC. 3218.** The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

If the provision of Sec. 1783, requiring presentment to a Notary, is not adopted, this section must be modified by inserting, after "excused," "if the holder cannot, with reasonable diligence, find any person authorized to accept it, or."

N. Y. C. C., Sec. 1803.

NOTE.—See Secs. 3186 and 3131.

Delay, when excused.

**SEC. 3219.** Delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control.

N. Y. C. C., Sec. 1804.

Presentment and notice, when excused.

**SEC. 3220.** Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.

N. Y. C. C., Sec. 1805.

## ARTICLE VIII.

### FOREIGN BILLS.

#### SECTION 3224. Definitions.

- 3225. Protest necessary.
- 3226. Protest, by whom made.
- 3227. Protest, how made.
- 3228. Protest, where made.
- 3229. Protest, when to be made.
- 3230. Protest, when excused.
- 3231. Notice of protest, how given.
- 3232. Waiver of protest.
- 3233. Declaration before payment for honor.
- 3234. Damages allowed on dishonor of foreign bill.
- 3235. Rate of damages.
- 3236. Interest on amount of protested bill.
- 3237. Damages, how estimated.
- 3238. Same.

Definitions.

**SEC. 3224.** An inland bill of exchange is one drawn and payable within this State. All others are foreign.

It has been strongly urged upon the Commissioners, by gentlemen whose experience entitles their opinion to great weight, that all bills drawn and payable within the United States should be deemed inland bills. The adoption of this suggestion would, however, involve so great a change that

is considered advisable to leave the text as it is, and submit the question to the wisdom of the Legislature.

N. Y. C. C., Sec. 1806.

Notice of the dishonor of a foreign bill of exchange is given only by notice of its protest.

Protest  
necessary.

N. Y. C. C., Sec. 1807.

Protest must be made by a Notary Public, or by the diligence one can be obtained; and if by a reputable person, in the presence of two

Pr test, by  
whom made.

N. Y. C. C., Sec. 1808.

Protest must be made by an instrument in which is a literal copy of the bill of exchange, with the date when it was presented thereon, or annexing the original; the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, or the refusal to accept or to pay, or the refusal of the drawee to give a binding acceptance; the refusal, the reason assigned, if any; and the protest against all the parties to be charged.

Protest,  
how made.

N. Y. C. C., Sec. 1809.

A protest for non-acceptance must be made at the place where the bill is presented for acceptance; and a protest for non-payment in the city or town where it is presented for payment.

Protest,  
where made.

N. Y. C. C., Sec. 1810.

A protest must be noted on the day of presentation, or on the next business day; but it may be made at any time thereafter.

Protest,  
when to be  
made.

N. Y. C. C., Sec. 1811.

The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases of want or delay of presentment.

Protest,  
when  
excused.

N. Y. C. C., Sec. 1812.

Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the person who makes the protest.

Notice of  
protest, how  
given.

N. Y. C. C., Sec. 1813.

Waiver of  
protest.

Sec. 3232. If a foreign bill waives protest, notice of dishonor to the party thereto, in like manner as if any indorser of such bill, is not to be made, by a direct indorsement before his indorsement, protest of the bill thereof given to him and to the indorser.

N. Y. C. C., Sec. 1

Declaration  
before pay-  
ment for  
honor.

Sec. 3233. One who pays for honor must declare, before payment, that he is not a person authorized to make payment for honor, or that he pays the same, in order to be entitled to reimbursement.

N. Y. C. C., Sec.

Damages  
allowed on  
dishonor of  
foreign bill.

Sec. 3234. Damages are allowed on bills of exchange, as a full compensation for expenses, and all other damages, and the value only, upon bills of exchange within this State, and upon bills of exchange non-payment.

N. Y. C. C., Sec. 1

Rate of  
damages.

Sec. 3235. Damages are allowed on bills drawn upon any place.

1. If such bill is drawn upon any place in the United States east of the Rocky Mountains, upon the hundred, upon the bill.

2. If such bill is drawn upon any place in Europe, or in any place in Africa, upon the hundred, upon the bill.

Note.—“Bills of exchange drawn upon any place in the United States east of the Rocky Mountains; a third add the value of the bill, and a fourth, outside of California.”

Interest on  
amount of  
protested  
bill.

Sec. 3236. From the date of protest, interest must be allowed upon the principal sum specified in the bill, at the rate specified in the preceding section.

“Bills of Exchange.”

the amount of a protested bill of exchange in money of the United States, damaged upon such amount without regard to exchange.

Damages,  
how esti-  
mated.

Y. C. C., Sec. 1818.

the amount of a protested bill of exchange in foreign money, damages are estimated at the value of a similar bill at the time of protest nearest to the place where the bill was sold.

Same.

Y. C. C., Sec. 1819.

### CHAPTER III.

#### PROMISSORY NOTES.

Promissory note, what.

Sections applicable to promissory notes.

Bill of exchange, when converted into a note.

Sections applicable to notes.

Effect of delay in presentment.

A promissory note is an instrument, negotiable, whereby the signer promises to pay a certain sum of money.

Promissory  
note, what.

Y. C. C., Sec. 1820.

An instrument in the form of a bill of exchange, drawn upon and accepted by the drawer, is deemed a promissory note.

Certain  
instruments,  
promissory  
notes.

Y. C. C., Sec. 1821.

A bill of exchange, if accepted, with the drawer, by a person other than the drawee, for honor, becomes in effect the promissory note of the acceptor, and all prior parties thereto are discharged.

Bill of ex-  
change,  
when con-  
verted into  
a note.

Y. C. C., Sec. 1822.

Sections 1 of this Title, and Secs 3181 and 3182, apply to promissory notes.

Certain  
sections  
applicable  
to notes.

Y. C. C., Sec. 1823.

Effect of  
delay in pre-  
sentment

SEC. 3248. If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment, within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.

N. Y. C. C., Sec. 1824.

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## CHAPTER IV.

### CHECKS.

SECTION 3254. Check, what.

3255. Rules applicable to checks.

Check, what.

SEC. 3254. A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest.

N. Y. C. C., Sec. 1825.

Rules appli-  
cable to  
checks.

SEC. 3255. A check is subject to all the provisions of this Code concerning bills of exchange, except that—

1. The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby, and are exonerated to that extent by a delay of more than one day in presentment.

2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

N. Y. C. C., Sec. 1826.

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## CHAPTER V.

### BONDS, BANK NOTES AND CERTIFICATES OF DEPOSIT.

SECTION 3361. Bank note negotiable after payment.

3362. Title acquired by indorsee.

Bank note  
negotiable  
after pay-  
ment.

SEC. 3261. A bank note remains negotiable, even after it has been paid by the maker.

N. Y. C. C., Sec. 1827.





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# PART I.

## RELIEF.

- . RELIEF IN GENERAL.
- . COMPENSATORY RELIEF.
- SPECIFIC RELIEF
- . PREVENTIVE RELIEF.

---

## TITLE I.

### RELIEF IN GENERAL.

of relief.  
in case of forfeiture.

a general rule, compensation is the relief  
ed by the law of this State for the vio-  
rights, and the means of securing their  
specific and preventive relief may be  
cases than those specified in this Part  
E.

Y. C. C., Sec. 1830.

enever, by the terms of an obligation,  
incurs a forfeiture, or a loss in the nature  
reason of his failure to comply with its  
y be relieved therefrom, upon making  
to the other party, except in case of a  
, wilful or fraudulent breach of duty.

ugh this doctrine, especially as applied to contracts,  
in its origin of purely equitable cognizance, it is now  
applied in all actions, and to be considered in estimat-  
images, as well as in granting specific relief (see Spaul-  
rs. Hallenbeck, 89 Barb., 78).

Y. C. C., Sec. 1831.

Species of  
relief.

Relief in case  
of forfeiture.

## TIT

## COMPENSATION

CHAPTER I. DAMAGE  
II. MEASUREMENT

## CHAPTER

## DAMAGES

ARTICLE I. GENERAL  
II. INTEREST  
III. EXEMPTION

## ARTICLE

## GENERAL

SECTION 3281. Person suffering damage  
3282. Detriment, what.  
3283. Injuries resulting

Person  
suffering  
detriment  
may recover  
damages.

SEC. 3281. Every person who suffers damage from the unlawful act or omission of another person in fault and for which he is liable is entitled to recover from the person in fault a sum of money which is called damages.

N. Y. C. C., Sec. 3281.

Detriment,  
what.

SEC. 3282. Detriment is a loss of person or property.

This word is used in the words "loss or injury" and they must denote a loss of person or property, and not its value. A loss of person or property without injury is a loss, but a loss of value without injury is not a loss. The word "injury" is familiar and would be inadequate.

N. Y. C. C., Sec. 3282.

Injuries  
resulting or  
probable  
after suit  
brought.

SEC. 3283. Damages may be recovered for a loss of person or property, or certain to result therefrom, or certain to result therefrom, or certain to result therefrom.

N. Y. C. C., Sec. 3283.

## ARTICLE II.

## INTEREST AS DAMAGES.

Person entitled to recover damages, may recover interest thereon.

Actions other than contract.

Limit of rate by contract.

Acceptance of principal waives claim to interest.

Every person who is entitled to recover or capable of being made certain by calculation, right to recover which is vested in him at the day, is entitled also to recover interest at that day, except during such time as the law is altered by law, or by the act of the creditor, or the discharge of the debt.

Person entitled to recover damages, may recover interest thereon.

Y. C. C., Sec. 1835.

In an action for the breach of an obligation not arising from contract, and in every case of oppression or fraud, interest may be given, in the discretion of the court.

In actions other than contract.

*12 W. Rep., 385, 386; Wilson vs. Conine, 2 Johns., 31; Bissel vs. Hopkins, 4 Cow., 53; Hyde vs. Stone, 7 W. Rep., 354; Baker vs. Weller, 8 Wend., 504; Dillerback vs. Rome, 7 Cow., 294; Beals vs. Guernsey, 8 Johns., 446.*

Y. C. C., Sec. 1836.

The legal rate of interest stipulated by a contract is chargeable after a breach thereof, as long as the contract is superseded by a verdict or judgment.

Limit of rate by contract.

This rule is established in California, by statute (Kohler v. Smith, 2 Cal., 597). The common law rule is otherwise. Compare *Lawrence vs. Leake & Watts Orphan Asylum, 2 Den., 577.*

Y. C. C., Sec. 1837.

Acceptance of payment of the whole principal, waives all claim to interest.

Acceptance of principal waives claim to interest.

Y. C. C., Sec. 1838.

## ARTICLE III.

## EXEMPLARY DAMAGES.

Exemplary damages, in what cases allowed.

Exemplary  
damages, in  
what cases  
allowed.

**Sec. 3294.** In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

In this the Commissioners have taken the rule as now settled in this State by the Court of Appeals (*Hunt vs. Bennett*, 19 N. Y., 173; and see *Johnson vs. Jenkins*, 24 N. Y., 252; *Fry vs. Bennett*, 1 Abb. Pr., 289; 4 Duer, 247; *Brown vs. Chadsey*, 39 Barb., 253, 259; *Sharon vs. Mosher*, 17 Barb., 518). The propriety of allowing damages by way of punishment has been, however, very earnestly and ably questioned. See the discussion of this subject in *Sedgwick on Dam.*, 3d ed., Chap. 18, and especially p. 477, note 2; and Appendix.

N. Y. C. C., Sec. 1839.

**NOTE.**—The same rule prevails in this State. (*Wilson vs. Middleton*, 2 Cal., 54; *Nightingale vs. Scannell*, 18 Cal., 315; *Dorsey vs. Manlove*, 14 Cal., 553.

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## CHAPTER II.

### MEASURE OF DAMAGES.

#### ARTICLE I. DAMAGES FOR BREACH OF CONTRACT.

##### II. DAMAGES FOR WRONGS.

##### III. PENAL DAMAGES.

##### IV. GENERAL PROVISIONS.

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#### ARTICLE I.

##### DAMAGES FOR BREACH OF CONTRACT.

#### SECTION 3300. Measure of damages for breach of contract.

3301. Must be in contemplation of parties.

3302. Of which the parties have notice.

3303. Damages must be certain.

3304. Breach of promise to pay liquidated sum.

3305. Dishonor of bills of exchange.

3306. Breach of covenant of seisin, etc.

3307. Rescission of contract by covenantee, when.

3308. Breach of certain Code covenants, how determined.

3309. Damages where title is void.

3310. Damages where title is defective or disputed.

3311. Failure to perfect title not to preclude obtaining relief, when.

3312. On payment of costs before action or judgment, covenantor may perfect title.



**SECTION 3313. Breach of Common Law Covenant against encumbrances.**

3314. Damages where encumbrance is upon only a part of the property.

3315. Breach of Special Code Covenants against encumbrances.

3316. Breach of agreement to convey real property.

3317. Breach of agreement to buy real property.

3318. Breach of agreement to sell personal property, not paid for.

3319. Breach of agreement to sell personal property, paid for.

3320. Breach of agreement to pay for personal property sold.

3321. Breach of agreement to buy personal property.

3322. Breach of warranty of title to personal property.

3323. Breach of warranty of quality of personal property.

3324. Breach of warranty of quality for special purpose.

3325. Breach of carrier's obligation to receive goods, etc.

3326. Breach of carrier's obligation to deliver.

3327. Carrier's delay.

3328. Breach of warranty of authority.

3329. Breach of promise of marriage.

**NOTE.**—The following is Sec. 1840 of the New York Civil Code, and its references :

**Sec. 1840.** For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, which the party in fault had notice at the time of entering into the contract, or at any time before the breach, and while it was in his power to perform the contract on his part, would be likely to result from such breach, or which, in the ordinary course of things, would be likely to result therefrom.

*Note A.*—*Griffin vs. Colver*, 16 N. Y., 489; *Hadley vs. Baxendale*, 9 Exch., 341; *Gee vs. Lanc. & Yorksh. Railw. Co.*, 6 H. & N., 211; *Wilson vs. L. & Y. Railw. Co.*, 9 C. B. [N. S.], 632; *Landsberger vs. Magnetic Telegraph Co.*, 32 Barb., 530; *Smeed vs. Foord*, 1 El. & El., 602; *Boyd vs. Fitt*, 14 Irish Law, 43.

*Note B.*—This provision adopts the suggestion of Baron Bramwell, in *Gee vs. L. & Y. Railw. Co.* (6 H. & N., 211), though it is conceded that it is not undoubted law. See also, as to extraordinary damages, *Dunlop vs. Higgins*, 1 H. of L. Cas., 381.

*Note C.*—This clause is plainly a just qualification of the preceding one.

The three following sections have been substituted for the one New York section. Notes *A*, *B*, *C*, refer to sections as follows: Note *A*, to Sec. 3300; Note *B*, to Sec. 3301; Note *C*, to Sec. 3302. We think the reasons for making the change will be obvious. The change is only in the form of expression.

**SEC. 3300.** For the breach of an obligation arising from a contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby.

Measure of  
damages for  
breach of  
contract.

N. Y. C. C., Sec. 1840.

Must be in contemplation of parties.

SEC. 3301. When the the contemplation of the into the contract, it is pro  
[New section.] Based on N. Y.

Of which the parties have notice.

SEC. 3302. When the entering into the contract and while it is in his power his part, has notice of d ordinary course of things, detriment is proximate.  
[New section.] Based on N. Y.

Damages must be certain.

SEC. 3303. No damage of contract, which are no their nature and origin.

Griffin vs. Colv  
N. Y. C. C., 80

Breach of promise to pay liquidated sum.

SEC. 3304. The detrim obligation to pay money o due by the terms of the ot

Sedgw. Dam.,  
N. Y. C. C., 80

Dishonor of bills of exchange.

SEC. 3305. For the di change, the damages are and 3238.

N. Y. C. C., 80

Breach of covenant of seisin, etc.

SEC. 3306. The detrim Common Law Covenant o of "warranty," or of "q real property, is deemed t

1. The price paid to th partial only, such proport the property affected by the grant, to the value of

2. Interest thereon for grantee derived no bene ceeding four years.

3. Any expenses proper in defending his possession

N. Y. C. C., 80

**NOTE.**—The “right to convey,” is not mentioned as a Common Law Covenant by the New York revisers, in Sec. 868, and yet this section fixes a rule of damages for a breach of it. (See Sec. 1119 of this Code.)

**SEC. 3307.** Where there is a breach of a Code Covenant in respect to a part of or the whole of the property, or with respect to any particular requirement of the covenant, the covenantee may elect to rescind the contract, subject to the rules in Chap. II, Tit. V, Part II, Div. III, on *Rescission*, or he may have relief pursuant to the following sections.

Rescission of contract by covenantee, when.

[New section.]      **NOTE.**—See Sec. 1689.

**SEC. 3308.** The detriment caused by the breach of the Special Code Covenant “against prior grants made by grantor,” mentioned in Subd. 1, Sec. 1105, or of the General Code Covenant of “ownership,” mentioned in Subd. 1, Sec. 1106, is determined by the five following sections.

Breach of certain Code covenants, how determined.

[New section.]

**SEC. 3309.** When the title is void as to the whole or a part, the detriment is—

Damages where title is void.

1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property.

2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding four years.

N. Y. C. C., Sec. 1844—modified.

**SEC. 3310.** When the title or possession is defective or disputed, but is capable of being perfected by judicial or other proceedings, or otherwise, or when there is a paramount title, the covenantee may elect to retain the property and perfect the title or possession, or purchase the paramount title, and in such case the expenses properly incurred, not exceeding the original amount of purchase money paid, shall be the measure of damages.

Damages where title is defective or disputed.

[New section.]

**SEC. 3311.** If the covenantee, in good faith, undertakes to recover or defend the possession, or to obtain or perfect the title, and fails to accomplish such undertaking,

Failure to perfect title not to preclude obtaining relief, when.

he is not precluded from obtaining relief under the three preceding sections.

[New section.]

On payment of costs before action or judgment, covenantor may perfect title.

SEC. 3312. The covenantor, at any time before action, or judgment in an action on the covenant, on payment of costs, if any, may make good the covenant by supplying a paramount title, or perfecting the title granted, or by performing any act which, if performed before the execution of the covenant, would have prevented the breach.

[New section.]

Breach of Common Law Covenant against encumbrances.

SEC. 3313. The detriment caused by the breach of a Common Law Covenant against encumbrances, in a grant of an estate in real property, is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof.

N. Y. C. C., Sec. 1845—divided.

Damages where encumbrance is upon only a part of the property.

SEC. 3314. If the encumbrance mentioned in the preceding section is upon only a part of the property included in the grant, the amount of damages for the principal extinguished must be a proportion of the price paid to the grantor, equivalent to the relative value, at the time of the grant, of the property affected by the breach, as compared with the whole; or, in the latter case, interest on a like amount.

N. Y. C. C., Sec. 1845—divided.

Breach of Special Code Covenants against encumbrances.

SEC. 3315. The detriment caused by the breach of the Special Code Covenant "against encumbrances imposed or suffered by the grantor," mentioned in Subd. 2, Sec. 1105, and of the General Code Covenant "against encumbrances," mentioned in Subd. 2, Sec. 1106, must be determined by the provisions of the two preceding sections.

Breach of agreement to convey real property.

SEC. 3316. The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the

, and the expenses properly incurred  
 or upon the land.

C. C., Sec. 1846.

detriment caused by the breach of an  
 base an estate in real property, is  
 excess, if any, of the amount which  
 lue to the seller, under the contract,  
 re property to him.

Breach of  
 agreement  
 to buy real  
 property.

a present law of this State, one who has agreed to  
 property may recover the full contract price from  
 haser, without actually transferring the title to him,  
 red to do so before commencing the action (Rich-  
 Edick, 17 Barb., 260; Franchot vs. Leach, 5 Cow.,  
 less he has actually sold the property to a third per-  
 leon vs. Holden, 16 Abb. Pr., 133). This rule is,  
 , an unjust one, as was admitted in Richards vs.  
 17 Barb., 260), where it was said that if the ques-  
 ) a new one, the rule stated in the text should be  
 but that the contrary was too well settled in this  
 be changed by judicial intervention. This section  
 be rule which is settled in England (Laird vs. Pim.,  
 W., 474).

C. C., Sec. 1847.

detriment caused by the breach of a  
 o deliver personal property, the price  
 een fully paid in advance, is deemed

Breach of  
 agreement to  
 sell personal  
 property not  
 paid for.

to be the excess, if any, of the value of the property to  
 the buyer, over the amount which would have been due  
 to the seller under the contract, if it had been fulfilled.

N. Y. C. C., Sec. 1848.

Sec. 3319. The detriment caused by the breach of a  
 seller's agreement to deliver personal property, the price  
 of which has been fully paid to him in advance, is deemed  
 to be the same as in case of wrongful conversion.

Breach of  
 agreement to  
 sell personal  
 property  
 paid for.

N. Y. C. C., Sec. 1849.

Sec. 3320. The detriment caused by the breach of a  
 buyer's agreement to accept and pay for personal prop-  
 erty, the title to which is vested in him, is deemed to be  
 the contract price.

Breach of  
 agreement  
 to pay for  
 personal  
 property  
 sold.

N. Y. C. C., Sec. 1850.

Sec. 3321. The detriment caused by the breach of a  
 buyer's agreement to accept and pay for personal prop-  
 erty, the title to which is not vested in him, is deemed  
 to be:

Breach of  
 agreement to  
 buy personal  
 property.

1. If the property has been resold, pursuant to Sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or,

2. If the property has not been resold in the manner prescribed by Sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller; together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it.

This provision seems to be only reasonable. Some things are marketable only in large cities, yet are manufactured or owned, in many cases, by persons living in the country. If such things should be bought by a resident of the country, the expense of forwarding them to him might be trifling, compared with the expense of transportation to the nearest market. Justice to the buyer requires that the market price should be allowed to him, but justice to the seller requires that he should be allowed the increased cost of sending the things to market.

N. Y. C. C., Sec. 1851.

Breach of warranty of title to personal property.

SEC. 3322. The detriment caused by the breach of a warranty of the title of personal property sold, is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any costs which he has become liable to pay, in an action brought for the property by the true owner.

A different rule has been laid down in this State, conforming to the rule concerning real property (*Armstrong vs. Percy*, 5 Wend., 535); but this section states the law as it appears to be in England (see *Simons vs. Patchett*, 7 E. & B., 568), and as appears to be most in accordance with general principles.

N. Y. C. C., Sec. 1852.

Breach of warranty of quality of personal property.

SEC. 3323. The detriment caused by the breach of a warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

N. Y. C. C., Sec. 1853.

Breach of warranty of quality for special purpose.

SEC. 3324. The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compen-

incurred by an effort in good faith to  
pose.

. C. C., Sec. 1854.

detriment caused by the breach of a  
to accept freight, messages or passen-  
be the difference between the amount  
ght to charge for the carriage, and the  
amount which it would be necessary to pay for the same  
service, when it ought to be performed.

Breach of  
carrier's  
obligation  
to receive  
goods, etc.

N. Y. C. C., Sec. 1855.

SEC. 3326. The detriment caused by the breach of a  
carrier's obligation to deliver freight, where he has not  
converted it to his own use, is deemed to be the value  
thereof, at the place and on the day at which it should  
have been delivered, deducting the freightage to which  
he would have been entitled, if he had completed the  
delivery.

Breach of  
carrier's  
obligation  
to deliver.

N. Y. C. C., Sec. 1856.

SEC. 3327. The detriment caused by a carrier's delay  
in the delivery of freight, is deemed to be the deprecia-  
tion in the intrinsic value of the freight during the delay,  
and also the depreciation, if any, in the market value  
thereof, otherwise than by reason of a depreciation in its  
intrinsic value, at the place where it ought to have been  
delivered, and between the day at which it ought to have  
been delivered, and the day of its actual delivery.

Carrier's  
delay.

The rule here adopted is supported by the weight of au-  
thority, and, as the Commissioners believe, by the weight of  
reason. It is to be observed that the latter branch of the  
rule does not include the former. Goods may advance in  
the market, and yet be so injured by delay as to diminish  
their intrinsic value. The carrier ought not to benefit by  
his own fault.

N. Y. C. C., Sec. 1857.

SEC. 3328. The detriment caused by the breach of a  
warranty of an agent's authority, is deemed to be the  
amount which could have been recovered and collected  
from his principal if the warranty had been complied  
with, and the reasonable expenses of legal proceedings  
taken, in good faith, to enforce the act of the agent  
against his principal.

Breach of  
warranty of  
authority.

N. Y. C. C., Sec. 1858.

Breach of  
promise of  
marriage.

SEC. 3329. The damages for the breach of a promise of marriage rest in the sound discretion of the jury.

Southard vs. Rexford, 6 Cow., 254 ; see Johnson vs. Jenkins, 24 N. Y., 252.

N. Y. C. C., Sec. 1859.

## ARTICLE II.

### DAMAGES FOR WRONGS.

SECTION 3333. Breach of obligation other than contract.

3334. Wrongful occupation of real property.

3335. Wilful holding over.

3336. Conversion of personal property.

3337. Same.

3338. Damages of lienor.

3339. Seduction.

3340. Injuries to animals.

Breach of  
obligation  
other than  
contract.

SEC. 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

N. Y. C. C., Sec. 1860.

Wrongful  
occupation  
of real  
property.

SEC. 3334. The detriment caused by the wrongful occupation of real property, in cases not embraced in Secs. 3335, 3344, 3345 and 3346, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

N. Y. C. C., Sec. 1861.

Wilful hold-  
ing over.

SEC. 3335. For wilfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

N. Y. C. C., Sec. 1862.



## CIVIL CODE.

e detriment caused by the wrongful  
al property, is presumed to be—

`the property at the time of the cor  
at from that time, or, where the ac  
ed with reasonable diligence, the hig  
the property at any time between  
e verdict, without interest, at the op  
rty; and,

ensation for the time and money  
i pursuit of the property.

Y. C. C., Sec. 1863.

e presumption declared by the last  
pelled, in favor of one whose posses  
m the beginning, by his subsequent  
property to the benefit of the ow  
nt.

Y. C. C., Sec. 1864.

e having a mere lien on personal  
over greater damages for its convers  
a right thereto superior to his, after  
, than the amount secured by the  
ation allowed by Sec. 3336 for los  
s.

Y. C. C., Sec. 1865.

e damages for seduction rest in the ac  
jury.

Y. C. C., Sec. 1866.

• wrongful injuries to animals, b  
ty, committed wilfully, or by gross  
ard of humanity, exemplary dam

Y. C. C., Sec. 1867.

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## ARTICLE III.

### PENAL DAMAGES.

e to quit, after notice.

t wilfully holding over.

le exclusion from possession of real property.

as to trees, etc.

is inflicted in a duel.

Failure to  
quit, after  
notice.

SEC. 3344. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay.

N. Y. C. C., Sec. 1868.

Tenant wil-  
fully holding  
over.

SEC. 3345. For wilfully holding over real property, by a tenant, after the end of his term, and after notice to quit has been duly given, and demand of possession made, the measure of damages is double the yearly value of the property, for the time of withholding, in addition to compensation for the detriment occasioned thereby.

N. Y. C. C., Sec. 1869.

NOTE.—Secs. 791 and 792 of this Code must be substituted for the two preceding sections, before adoption. Their sameness of subject and difference of locality was discovered too late to remedy in this print—one of the little accidents in revision.

Forcible  
exclusion  
from posses-  
sion of real  
property.

SEC. 3346. For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

N. Y. C. C., Sec. 1870.

NOTE.—Change Sec. 1174 (C. C. P.) to correspond with the three preceding sections, or change these sections to correspond with that.

Injuries to  
trees, etc.

SEC. 3347. For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

N. Y. C. C., Sec. 1871.

Injuries  
inflicted in  
a duel.

SEC. 3348. If any person slays or permanently disables another person in a duel in this State, the slayer shall provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a

y or annual allowance, to be determined

ed on Stats. 1855, 152.

any person slays or permanently disa- Same.  
son in a duel in this State, the slayer  
r and shall pay all debts of the person

slain or permanently disabled.

[New section.] Based on Stats. 1855, 152.

#### ARTICLE IV.

##### GENERAL PROVISIONS.

Section 3353. Value, how estimated in favor of seller.

3354. Value, how estimated in favor of buyer.

3355. Property of peculiar value.

3356. Value of thing in action.

3357. Damages allowed in this chapter, exclusive of others.

3358. Limitation of damages.

3359. Damages to be reasonable.

3360. Nominal damages.

Sec. 3353. In estimating damages, the value of prop-  
erty, to a seller thereof, is deemed to be the price which  
could have obtained therefor in the market nearest to  
place at which it should have been accepted by the  
seller, and at such time after the breach of the contract  
would have sufficed, with reasonable diligence, for the  
seller to effect a resale.

Value, how  
estimated  
in favor of  
seller.

N. Y. C. C., Sec. 1872.

Sec. 3354. In estimating damages, except as provided  
Secs. 3355 and 3356, the value of property, to a buyer  
owner thereof, deprived of its possession, is deemed to  
be the price at which he might have bought an equiva-  
lent thing in the market nearest to the place where the  
property ought to have been put into his possession, and  
such time after the breach of duty upon which his right  
damages is founded as would suffice, with reasonable  
diligence, for him to make such a purchase.

Value, how  
estimated  
in favor of  
buyer.

N. Y. C. C., Sec. 1873.

Sec. 3355. Where certain property has a peculiar  
value to a person recovering damages for deprivation

Property  
of peculiar  
value.

thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a wilful wrong-doer.

N. Y. C. C., Sec. 1874.

Value of  
thing in  
action.

SEC. 3356. For the purpose of estimating damages, the value of a thing in action is presumed [*prima facie*] to be equal to that of the property to which it entitles its owner.

N. Y. C. C., Sec. 1875.

NOTE.—The words “*prima facie*” have been inserted in the text of the New York Civil Code, to avoid the doubt as between conclusive and *prima facie* presumptions.

Damages  
allowed in  
this chapter,  
exclusive of  
others.

SEC. 3357. The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned.

N. Y. C. C., Sec. 1876.

Limitation  
of damages.

SEC. 3358. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on *Exemplary Damages* and *Penal Damages*, and in Secs. 3329, 3339 and 3340.

This is an established principle of equity (*Skinner vs. White*, 17 Johns., 357; rev'g S. C., 2 Johns. Ch., 526), which, since the union of law and equity, should be recognized as a rule of damages. See a decision upon a similar question in *Russell vs. Roberts*, 3 E. D. Smith, 313.

N. Y. C. C., Sec. 1877.

Damages to  
be reason-  
able.

SEC. 3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

*James vs. Morgan*, 2 Levinz, 111; *Thornborow vs. Whitacre*, 2 Ld. Raym., 1164. In the first case, the defendant had agreed to pay, for a horse sold to him, a farthing for his first shoe nail, two farthings for the second, four for the third, and so on, for the thirty-two nails in the horse's shoes. This, of course, amounted to many thousand pounds sterling, for which the plaintiff sued. But the Court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case, a somewhat similar bargain was entered into, the dam-

ages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the Court was, at first, about to give judgment for the whole sum demanded; but an *amicus curiæ* mentioning the case of *James vs. Morgan*, the action was settled, under an intimation of the Court, by the repayment of the consideration received for the contract (2s. 6d.), and costs.

N. Y. C. C., Sec. 1878.

When a breach of duty has caused no ap- Nominal  
damages.  
riment to the party affected, he may yet re-  
al damages.

N. Y. C. C., Sec. 1879.

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## TITLE III.

### PECIFIC AND PREVENTIVE RELIEF.

#### PART I. GENERAL PRINCIPLES.

##### II. SPECIFIC RELIEF.

##### III. PREVENTIVE RELIEF.

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### CHAPTER I.

#### GENERAL PRINCIPLES.

Specific relief, etc., when allowed.

Specific relief, how given.

Preventive relief, how given.

Not to enforce penalty, etc.

Specific or preventive relief may be given Specific  
relief, etc.,  
when  
allowed.  
specified in this Title, and in no others.

N. Y. C. C., Sec. 1880.

Specific relief is given— Specific  
relief, how  
given.  
ing possession of a thing, and delivering it to

selling a party himself to do that which  
done; or,

aring and determining the rights of parties,  
an by an award of damages.

The first includes the ordinary remedies in the common  
law actions of ejectment and replevin, or, as they may be  
called under the Code, actions for land and actions for  
chattels.

The second includes the specific performance of contracts, the delivery of things wrongfully detained, the surrender of instruments to be cancelled, etc.

The third includes all cases in which a right is determined, without ulterior measures. Thus a contract may be declared void, although the instrument containing it is lost; a judgment may be annulled for fraud; the occupant of land may be declared to have a good title as against a claimant who does not himself sue, etc.

N. Y. C. C., Sec. 1881.

Preventive  
relief, how  
given.

SEC. 3368. Preventive relief is given by prohibiting a party from doing that which ought not to be done.

N. Y. C. C., Sec. 1882.

Not to  
enforce  
penalty, etc.

SEC. 3369. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case.

N. Y. C. C., Sec. 1883.

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## CHAPTER II.

### SPECIFIC RELIEF.

- ARTICLE I. POSSESSION OF REAL PROPERTY.  
 II. POSSESSION OF PERSONAL PROPERTY.  
 III. SPECIFIC PERFORMANCE OF OBLIGATIONS.  
 IV. REVISION OF CONTRACTS.  
 V. RESCISSION OF CONTRACTS.  
 VI. CANCELLATION OF INSTRUMENTS.

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### ARTICLE I.

#### POSSESSION OF REAL PROPERTY.

SECTION 3375. Judgment for possession or title.

Judgment  
for posses-  
sion or title.

SEC. 3375. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the CODE OF CIVIL PROCEDURE, either by a judgment for its possession, to be executed by the Sheriff, or by a judgment requiring the other party to perfect the title, and to deliver possession of the property.

N. Y. C. C., Sec. 1884.

NOTE.—See Sec. 1213 upon the same subject. Compare, and expunge one or the other.

## ARTICLE II.

## POSSESSION OF PERSONAL PROPERTY.

SECTION 3379. Judgment for delivery.

3380. When holder may be compelled to deliver.

SEC. 3379. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the CODE OF CIVIL PROCEDURE.

Judgment  
for delivery.

N. Y. C. C., Sec. 1885.

SEC. 3380. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in either of the following cases:

When holder  
may be com-  
pelled to  
deliver.

1. When the thing claimed is held subject to an express trust in favor of the claimant.
2. When pecuniary compensation would not afford adequate relief for the loss of the thing claimed; or,
3. When it would be extremely difficult to ascertain the actual damage caused by its loss.

This section is intended to provide for the relief granted by Courts of equity in the cases specified. The ordinary remedy in an action for chattels may be evaded by any one who has sufficient means to pay their value, by the exercise of a little ingenuity. Accordingly, Courts of equity have long intervened to compel a wrong-doer *himself* to deliver up the things detained by him.

It will be observed that this remedy is not confined to cases of *wrongful* possession. It may often happen that one who holds a thing in trust may secretly design to make a wrongful disposition of it, and that the owner may have an intimation or suspicion of this design, but no legal evidence of it. A demand before suit might lead to a sudden disposition of the thing, and result in its total loss. The owner ought, therefore, to be allowed to sue without a prior demand, subject to the discretion of the Court as to costs, if it appears that he has made unnecessary litigation (see *Bruce vs. Tilson*, 25 N. Y., 194). But the section is so restricted as not to include the case of a thing agreed to be sold.

The inadequacy of compensation in damages is the true test of a plaintiff's right to this special relief (*North vs. Great Northern Railw. Co.*, 2 Giff., 69). Thus freight cars for use upon a railway were decreed to be delivered up, on the ground that similar cars could not be bought ready made, and that compensation in damages would not cover the loss which would be caused by delay (*id.*). It is not, therefore, deemed advisable to attempt any enumeration, in the text of the Code, of the articles which may be recovered by this process. There would be little danger of injustice being done, if this remedy should be more widely applied. A summary of the principal cases in which a specific delivery has been enforced, may however be useful.

Courts of equity have compelled the delivery of old and rare paintings (*Lowther vs. Lowther*, 13 Ves., 95), of

family paintings (*Hunt vs. Moultrie*, 1 Bosw., 531; *aff'd* in Ct. of Appeals), of an ancient altar piece in silver, with a Greek inscription (*Somerset vs. Cookson*, 3 P. Wms., 389), of a gold snuff box (*Fells vs. Reed*, 3 Ves., 70), of heir looms (*Macclesfield vs. Davis*, 3 Ves. & B., 18; *Pusey vs. Pusey*, 1 Vern., 273), of family plate (*Geoffry vs. Davis*, Cary, 34), of jewels (*Saville vs. Tankred*, 1 Ves. Sr., 101; *Belt. Supp.*, 70; *Young vs. Eurrel*, Cary, 54), of farm stock (*Nutbrown vs. Thornton*, 10 Ves., 159), of masonic regalia (*Lloyd vs. Learing*, 6 Ves., 773), of mortgage deeds (*Jackson vs. Butler*, 2 Atk., 306; *Knye vs. Moore*, 1 Sim. & S., 61), of books of account (*Evans vs. Van Hall*, Clarke, 26; *Lingan vs. Simpson*, 1 Sim. & S., 600), and, in slave States, of particular slaves (*Hall vs. Clark*, 12 Sme. & N., 189; *Butler vs. Hicks*, 11 id., 79; *Murphy vs. Clark*, 1 id., 221; *Dudley vs. Mallory*, 4 Geo., 52; *Sims vs. Shelton*, 2 Strobb. Eq., 221; *Ellis vs. Commander*, 1 id., 188; *Sarter vs. Gordon*, 2 Hill's Ch., 121; *Lofton vs. Espy*, 4 Yerg., 84; 10 id., 30; *Williams vs. Howard*, 3 Murph., 74; *Young vs. Burton*, 1 McMull. Eq., 256). In *Dowling vs. Betjeman*, (2 Johns. & Hem., 544), the Court asserted its right to order the specific delivery of a new painting, upon the application of the artist himself, but the plaintiff in that case having put a valuation on the painting, this was held to show that compensation in damages would be sufficient relief.

N. Y. C. C., Sec. 1886.

### ARTICLE III.

#### SPECIFIC PERFORMANCE OF OBLIGATIONS.

##### SECTION 3384. In what cases compelled.

- 3385. Remedy mutual.
- 3386. No remedy unless mutual.
- 3387. Distinction between real and personal property.
- 3388. Contract signed by one party only, may be enforced by other.
- 3389. Liquidation of damages not a bar to specific performance.
- 3390. What cannot be specifically enforced.
- 3391. What parties cannot be compelled to perform.
- 3392. What parties cannot have specific performance in their favor.
- 3393. Specific performance not required when oppressive.
- 3394. Agreement to sell property by one who has no title.
- 3395. Relief against parties claiming under person bound to perform.

In what cases compelled.

SEC. 3384. Except as otherwise provided in this article, the specific performance of an obligation may be compelled—

1. When the act to be done is in the performance, wholly or partly, of an express trust.
2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.
3. When it would be extremely difficult to ascertain



the actual damage caused by the non-performance of the act to be done; or,

4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages shall not be considered adequate relief.

The word "obligation" is used, because some obligations created by operation of law may be enforced in this manner. It includes an award, which may be specifically enforced (*Bouck vs. Wilber*, 4 Johns. Ch., 405). The obligation must be a subsisting one (*Arnoux vs. Homans*, 25 How. Pr., 427).

Thus, a trustee who has wrongfully disposed of stock may be compelled to restore the same amount of stock (*Forrest vs. Elwes*, 4 Ves., 497). So the specific delivery of a common article of merchandise will be enforced, when held under a trust (*Pooley vs. Budd*, 14 Beav., 34; *Mechanics' Bank vs. Seton*, 1 Peters, 299; *M'Gowin vs. Remington*, 12 Penn. St., 56).

Though in most cases the act which is sought to be specifically enforced is a transfer of property, the jurisdiction is not confined to that class of cases. The Courts have thus enforced an agreement to insure (*Taylor vs. Merchants' Fire Ins. Co.*, 9 How. [U. S.], 405; *Carpenter vs. Mutual Ins. Co.*, 4 Sandf. Ch., 408; *Neville vs. Merchants' Ins. Co.*, 19 Ohio, 452), to indorse a note (see *Watkins vs. Maule*, 2 Jac. & W., 242), to form a partnership (*Buxton vs. Lister*, 3 Atk., 385; *England vs. Curling*, 3 Beav., 129; *Birchett vs. Bolling*, 5 Munf., 442; *Anon.*, 2 Ves. Sr., 629), to discharge a judgment (*Phillips vs. Berger*, 8 Barb., 527; 2 id., 609), to release a mortgage (*Malins vs. Brown*, 4 N. Y., 403), to improve land (*Stuyvesant vs. Mayor, etc.*, of New York, 11 Paige, 414), to build an archway (*Stover vs. Gt. Western Railw. Co.*, 2 You. & Coll. Ch., 43), etc. The nature of the property affected, whether real or personal, is not decisive of the right to specific performance, which depends entirely upon the inadequacy of damages to compensate the injured party (*Story Eq. Jur.*, Sec. 717; see *Cathcart vs. Robinson*, 5 Peters, 264; *Adderley vs. Dixon*, 1 Sim. & S., 607; *Harnett vs. Yielding*, 2 Sch. & Lef., 549; *Dalzell vs. Crawford*, 1 Pars. Sel. Eq. Cas., 27).

*Falcke vs. Gray*, 4 Drewry, 651; 5 Jur. [N. S.], 645. Contracts for the sale of chattels of singular value (ib.), or of stock in a corporation (*Cheale vs. Kenward*, 5 De G. & J., 27; *Shaw vs. Fisher*, 5 De G., M. & G., 596; *Duncuft vs. Albrecht*, 12 Sim., 189), may be specifically enforced.

As to the fourth subdivision, there is no reported decision upon this proposition, but in these days, when a judgment for damages affords such very unsatisfactory relief in many cases, there seems much reason for allowing parties to enter into such a stipulation.

N. Y. C. C., Sec. 1887.

**SEC. 3385.** When either of the parties to an obligation is entitled to a specific performance thereof, according to the provisions of the last section, the other party is also entitled to it, though not within those provisions.

Remedy  
mutual.

*Story Eq. Jur.*, Sec. 723; *Phillips vs. Berger*, 8 Barb., 527; *Schroepel vs. Hopper*, 40 id., 425; *Withy vs. Cottle*, 1 Sim. & S., 174; *Turn. & Russ.*, 78; see *Crary vs. Smith*, 2 N. Y., 60.

N. Y. C. C., Sec. 1888.

No remedy  
unless  
mutual.

SEC. 3386. Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

*Flight vs. Bolland*, 4 Russ., 298; *Hargrave vs. Hargrave*, 12 Beav., 411; *Peto vs. Brighton, etc., Railw. Co.*, 1 Hem. & Mil., 468; *Pickering vs. Bp. of Ely*, 2 Y. & Coll. Ch., 249.

See *Dyer vs. Hargrave*, 10 Ves., 406; *Shackleton vs. Sutcliffe*, 1 De Gex & Sm., 609.

N. Y. C. C., Sec. 1889.

Distinction  
between real  
and personal  
property.

SEC. 3387. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved.

This rule seems to be the one upon which the Courts have generally, if not uniformly, acted. There are so few cases in which a refusal to convey land can be adequately compensated by damages, that it is usually stated in broad terms that specific performance can always be required in respect to contracts for the sale of land, but this is not strictly correct.

N. Y. C. C., Sec. 1890.

Contract  
signed by  
one party  
only, may  
be enforced  
by other.

SEC. 3388. A party, who has signed a written contract, may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.

*Story Eq. Jur.*, Sec., 736 a; *Woodward vs. Harris*, 3 Sandf., 272; *Matter of Hunter*, 1 Edw., 1; *Clason vs. Bailey*, 14 Johns., 484; *McCrea vs. Purmort*, 16 Wend., 460; *Ormond vs. Anderson*, 2 Ball & B., 370; *Western vs. Russell*, 3 Ves. & B., 192.

N. Y. C. C., Sec. 1891.

Liquidation  
of damages  
not a bar  
to specific  
performance

SEC. 3389. A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same.

*Story Eq. Jur.*, Secs. 715, 751; *Logan vs. Wienholt*, 1 Cl. & F., 611; 7 Bligh [N. S.], 1, 49; *Dewey vs. Watson*, 1 Gray, 414; *Plunkett vs. Meth. Ch.*, etc., 3 Cush., 566; *Ensign vs. Kellogg*, 4 Pick., 1; *Chilliner vs. Chilliner*, 2 Ves., 528; *Howard vs. Hopkyns*, 2 Atk., 321; see *Fisher vs. Shaw*, 42 Me., 32.

ve. Sturdivant, 46 Me., 34 ; Hooker vs. Pyncheon, 8  
550 ; see Coles vs. Sims, 5 De G., M. & G., 9 ; Giles  
art, 5 Jur. [N. S.], 1381 ; Nicholls vs. Stretton, 7  
42. This point was involved in Viale vs. Troy &  
R. R., 20 N. Y., 184.

L. C. C., Sec. 1892.

following obligations cannot be specifi-

What cannot  
be specifical-  
ly enforced.

to render personal service.

to employ another in personal service.

to submit a controversy to arbitration.

to perform an act, which the party

fully to perform when required to do so.

to procure the act or consent of the

acting party, or of any other third per-

nt, the terms of which are not suffi-

make the precise act which is to be

tainable.

L. C. C., Sec. 1893.

specific performance cannot be enforced  
to a contract, in any of the following

What parties  
cannot be  
compelled  
to perform.

received an adequate consideration for

as to him, just and reasonable.

was obtained by the misrepresentation,  
umvention, or unfair practices of any  
performance would become due under the  
ny promise of such party which has not  
7 fulfilled ; or,

was given under the influence of mis-  
nsion or surprise, except that where the  
for compensation in case of mistake, a  
re scope of such provision may be com-  
d the contract specifically enforced in  
proper to be so enforced.

L. C. C., Sec. 1894.

specific performance cannot be enforced  
y who has not fully and fairly performed  
precedent on his part to the obligation  
y, except where his failure to perform is  
either entirely immaterial, or capable of

What parties  
cannot have  
specific per-  
formance in  
their favor.

being fully compensated; in which case specific performance may be compelled, upon full compensation being made for the default.

N. Y. C. C., Sec. 1895.

Specific performance not required when oppressive.

SEC. 3393. Specific performance cannot be compelled when it would operate more harshly upon the party required to perform, than its refusal would operate upon the party seeking it.

N. Y. C. C., Sec. 1896.

Agreement to sell property by one who has no title.

SEC. 3394. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt.

N. Y. C. C., Sec. 1897.

Relief against parties claiming under person bound to perform.

SEC. 3395. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.

N. Y. C. C., Sec. 1898.

#### ARTICLE IV.

##### REVISION OF CONTRACTS.

SECTION 3399. When contract may be revised.

3400. Presumption as to intent of parties.

3401. Principles of revision.

3402. Enforcement of revised contract.

When contract may be revised.

SEC. 3399. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

N. Y. C. C., Sec. 1899.

the purpose of revising a contract, it that all the parties thereto intended to and conscientious agreement.

Presumption  
as to intent  
of parties.

. C. C., Sec. 1900.

revising a written instrument, the Court the instrument was intended to mean, ended to be its legal consequences, and the inquiry what the language of the ended to be.

Principles  
of revision

. C. C., Sec. 1901.

contract may be first revised and then d [either in the same or separate ac-

Enforcement  
of revised  
contract.

. C. C., Sec. 1902.

—The words in brackets are added to the text of New York Civil Code.

## ARTICLE V.

### RESCISSION OF CONTRACTS.

rescission may be adjudged.

on for mistake.

may require party rescinding to do equity.

rescission of a written contract may e application of a party aggrieved— cases mentioned in Sec. 1689 ; or, contract is unlawful, for causes not ap- pe, and the parties were not equally in

When rescis-  
sion may be  
adjudged.

public interest will be prejudiced by per-

It be observed that this section provides only for a out of rescission, without cancellation. Its scope is re properly broader than it would be in the latter It may be desirable to have a conclusive adjudica- on the validity of a contract, in cases where there is ficient ground for further interference. The discre- the Court as to costs is a sufficient check upon frivo- tions of this nature.

the injured party, or those claiming under him, can b a contract on account of his want of consent. in vs. Eaton, 20 Johns., 478.) Of course a party ting a fraud cannot have the contract set aside on ound.

. C. C., Sec. 1903.

NOTE.—See Secs. 1115, 3307 and 1689. Examine all together.

Rescission  
for mistake.

SEC. 3407. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

N. Y. C. C., Sec. 1904.

Court may  
require par-  
ty rescinding  
to do equity.

SEC. 3408. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

N. Y. C. C., Sec. 1905.

NOTE.—The words “for any other cause than usury” stricken out.

## ARTICLE VI.

### CANCELLATION OF INSTRUMENTS.

SECTION 3412. When cancellation may be ordered.

3413. Instrument obviously void.

3414. Cancellation in part.

When can-  
cellation  
may be  
ordered.

SEC. 3412. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled.

N. Y. C. C., Sec. 1906.

Instrument  
obviously  
void.

SEC. 3413. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section.

N. Y. C. C., Sec. 1907.

Cancellation  
in part.

SEC. 3414. Where an instrument is evidence of different rights or obligations, it may be cancelled in part, and allowed to stand for the residue.

Thus an indorser of a bill may be entitled to have his indorsement cancelled in a case which would not entitle the drawer to any relief. And an instrument might be partially valid against a party entitled to cancel it in part; although such cases are doubtless rare.

N. Y. C. C., Sec. 1908.

## CHAPTER III.

## PREVENTIVE RELIEF.

Preventive relief, how granted.

Provisional injunctions.

Injunction, when allowed.

Injunction, when not allowed.

Preventive relief is granted by injunction, provisional.

Preventive relief, how granted.

N. Y. C. C., Sec. 1909.

Provisional injunctions are regulated by CIVIL PROCEDURE.

Provisional injunctions.

N. Y. C. C., Sec. 1910.

Except where otherwise provided by this Code, an injunction may be granted to prevent the performance of an obligation existing in favor of the applicant, where monetary compensation would not afford adequate relief.

Injunction, when allowed.

Where monetary compensation would not afford adequate relief.

Where it would be extremely difficult to ascertain the value of the compensation which would afford adequate relief.

Where a restraint is necessary to prevent a multiplicity of proceedings; or, where an obligation arises from a trust.

N. Y. C. C., Sec. 1911.

An injunction cannot be granted—

1. In a judicial proceeding pending at the commencement of the action in which the injunction is demanded, where such restraint is necessary to prevent a multiplicity of such proceedings.

Injunction, when not allowed.

2. In proceedings in a Court of the United States, or in proceedings, in another State, upon a judgment of that State.

3. To restrain the execution of a public statute, by official duty, for the public benefit.

4. To restrain the breach of a contract, the performance of which would not be specifically enforced.

5. To restrain an injury to the person, character or property of the applicant, not amounting to a

nuisance ; except that in an action for divorce, an injunction may be granted to prevent interference with a wife or child.

7. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession.

8. To prevent a legislative act by a municipal corporation ; or,

9. Where relief, equally efficacious, can be obtained by any other usual mode of proceeding, except in case of breach of trust.

N. Y. C. C., Sec. 1912.



# PART II.

LATIONS OF DEBTOR AND CREDITOR.

AL PRINCIPLES.

ULENT INSTRUMENTS AND TRANSFERS.

UMENTS FOR THE BENEFIT OF CREDITORS.

## TITLE I.

GENERAL PRINCIPLES.

is a debtor.

is a creditor.

acts of debtor are valid.

ents in preference.

ive rights of different creditors.

debtor, within the meaning of this Title,  
ason of an existing obligation, is or may  
pay money to another, whether such lia-  
or contingent.

Who is a  
debtor.

Y. C. C., Sec. 1913.

creditor, within the meaning of this  
hose favor an obligation exists, by rea-  
is, or may become, entitled to the pay-

Who is a  
creditor.

Y. C. C., Sec. 1914.

the absence of fraud, every contract of  
against all his creditors, existing or sub-  
ve not acquired a lien on the property  
contract.

Contracts of  
debtor are  
valid.

Y. C. C., Sec. 1915.

debtor may pay one creditor in prefer-  
or may give to one creditor security for  
his demand in preference to another.

Payments  
preference.

Y. C. C., Sec. 1916.

Relative  
rights of  
different  
creditors.

SEC. 3433. Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to, some but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons.

N. Y. C. C., Sec. 1917.

## TITLE II.

### FRAUDULENT INSTRUMENTS AND TRANSFERS.

SECTION 3439. Transfers, etc., with intent to defraud creditors.

3440. Certain transfers presumed fraudulent.

3441. Rights of purchasers and mortgagees.

3442. Creditor's right must be judicially ascertained.

3443. Question of fraud, how determined.

Transfers,  
etc., with  
intent to  
defraud  
creditors.

SEC. 3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

N. Y. C. C., Sec. 1918; "Fraudulent Conveyances and Contracts," Sec. 20.

NOTE.—"Creditors" ought to be named, also, in Sec. 1227, with "purchasers" and "encumbrancers," as that section refers to "Fraudulent Transfers of Real Property." That section (1227) is an expression of Sec. 1 of the Act cited (Fraudulent Conveyances and Contracts). The term "creditors" is necessary to make that Title complete in itself. It would be an instance of duplicating a single word or line of the law to give completeness to an important subject, without disturbing the phraseology of one of the oldest and most thoroughly adjudicated sections. A section (1227 a) applying this section to transfers of real property, would, perhaps, accomplish the object best. Logically, the subjects of this section belong to the Titles on *Transfers of Real Property*, *Sales of Personal Property*, and *Obligations*.

**SEC. 3440.** Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a contract of bottomry or respondentia, is [conclusively] presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.

Certain transfers presumed fraudulent.

N. Y. C. C., Sec. 1919.

**NOTE.**—The word “conclusively,” in brackets, is inserted in the text of the New York Civil Code to conform with the requirement of our statute of Frauds, Sec. 15 (Hit. Dig., Sec. 3159). The following section from the New York Civil Code is retained as a note, and may be made a part of the text, if “conclusively” should be stricken from the above section :

**SEC. 1920.** The presumption declared by the last section may be repelled by showing that the transfer was made in good faith and without intent to defraud.

See note to preceding section ; also, see Sec. —, with note, in Title on *Personal Mortgage*.

**SEC. 3441.** The provisions of this Title do not affect the rights of a purchaser or encumbrancer, in good faith and for value.

Rights of purchasers and mortgagees.

N. Y. C. C., Sec. 1921.

**SEC. 3442.** A creditor can avoid the act or obligation of his debtor for fraud, only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.

Creditor's right must be judicially ascertained.

N. Y. C. C., Sec. 1922.

**SEC. 3443.** In all cases arising under this Title, or under Sec. 1227 of this Code, the question of fraudulent intent is one of fact, and not of law ; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

Question of fraud, how determined.

N. Y. C. C., Sec. 1923.

## TITLE III.

## ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. .

NOTE.—It is thought best to submit this Title, from the New York Code, to the Legislature. There *ought* to be some well ordered system by which a *debtor* can make an honorable distribution of his assets among his creditors, without the intervention of the Bankrupt Law. Of course such a State law could not prevent creditors carrying the assets into bankruptcy if they should doubt the intent of the assignment or the fitness of the assignee to execute it. Secs. 641, 642 and 643 of the Penal Code of New York ought to be inserted in our own Code. The notes to these sections in the New York Penal Code fully review the whole question.

## SECTION 3449. When debtor may execute assignment.

- 3450. Insolvency, what.
- 3451. Certain transfers not affected.
- 3452. What debts may be secured.
- 3453. What preferences may be given.
- 3454. Preference must be absolute.
- 3455. Certain rights not affected by preferences in assignment.
- 3456. Joint and separate debts.
- 3457. Assignment, when void.
- 3458. The instrument of assignment.
- 3459. Compliance with provisions of last section necessary to validity of assignment.
- 3460. Assignee takes, subject to rights of third parties.
- 3461. Inventory required.
- 3462. Verification of inventory.
- 3463. Recording assignment and filing inventory.
- 3464. Same.
- 3465. Effect of omitting to record.
- 3466. Assignment of real property.
- 3467. Bond of assignees.
- 3468. Conditions of disposal and conversion.
- 3469. Accountings.
- 3470. Property exempt.
- 3471. Compensation.
- 3472. Assignees protected for acts done in good faith.
- 3473. Assent of creditor necessary to modification of assignment.

When debtor  
may execute  
assignment.

SEC. 3449. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations or by other specific classes of persons.

The Commissioners have already reported, in Sec. 643 of the Penal Code, a provision making it a misdemeanor for an insolvent to make an assignment with preferences, except in the cases in which a preference is expressly allowed to be given by law. And they have stated quite fully, in a note to that section, the reasons which led them to recommend restricting so closely the right to make preferential assignments. The provisions of the Penal Code upon the subject are, of course, confined to imposing a punishment for attempting to make an illegal assignment. In the present chapter other provisions are presented in respect to the making of preferential assignments and the settlement of assigned estates.

The course of decision in this State upon the right to give preferences, and the various restrictions which have been imposed upon it, will be found reviewed in the Penal Code, Sec. 643, note.

N. Y. C. C., Sec. 1924.

**SEC. 3450.** A debtor is insolvent, within the meaning of this Title, when he is unable to pay his debts from his own means, as they become due

Insolvency  
what.

See *Herrick vs. Borst*, 4 Hill, 650; *Curtis vs. Leavitt*, 15 N. Y., 9, 199.

Compare also Sec. 1708 of this Code. The definition here given is purposely made more comprehensive than that presented in the section referred to, which relates to stoppage in transit. To bring an assignment within the provisions of this chapter, it is enough that the debtor has become unable to pay. To warrant the exercise of the right of stoppage in transit, he must have "stopped payment." The distinction is warranted by the existing law.

N. Y. C. C., Sec. 1925.

NOTE.—See Sec. 3077 of this Code.

**SEC. 3451.** The provisions of this Title do not prevent a person residing in another State or country from making there, in good faith, and without intent to evade the laws of this State, a transfer of property situated within it. nor do they affect the power of a person, although insolvent and within this State, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt, owing to such creditor, whether in his own right or otherwise.

Certain  
transfers no  
affected.

*Ackerman vs. Cross*, 40 Barb., 465; *Hall vs. Arnold*, 15 id., 599.

N. Y. C. C., Sec. 1926.

**SEC. 3452.** An assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent.

What debts  
may be  
secured.

N. Y. C. C., Sec. 1927.

What preferences may be given.

SEC. 3453. Except as otherwise specially provided by statute, an assignment by an insolvent debtor, for the benefit of creditors, may give a preference to one or more creditors or classes of creditors, in the following cases, and in no others:

1. Judgments may be preferred to debts not in judgment.

2. Debts which are liens or charges upon the assigned property, or upon some part of it, may be preferred to debts which are not such liens or charges.

3. Debts for money or other property lent without interest, may be preferred to debts for money lent upon interest, or for property sold.

4. Debts due from the assignor by virtue of a trust, may be preferred to debts which are not thus due; and,

5. Debts for personal services performed within six months next before the assignment, may, to an extent not exceeding one hundred dollars to any one person, be preferred to other debts not within any of the preceding classes.

N. Y. C. C., Sec. 1928.

Preference must be absolute.

SEC. 3454. A preference, in an assignment for the benefit of creditors, can only be given absolutely, and without reserving any power of revocation.

N. Y. C. C., Sec. 1929.

Certain rights not affected by preferences in assignment.

SEC. 3455. No provision in an assignment, giving a preference to a creditor, can affect or impair any right of another creditor to priority of payment, whether created by law, or arising from an obligation or transaction of the parties.

N. Y. C. C., Sec. 1930.

Joint and separate debts.

SEC. 3456. Joint, or joint and several debtors, can prefer their joint creditors only out of joint property; and can prefer the individual creditors of each, only out of the separate property of each.

This provision is partly new. Compare Kirby vs. Schoonmaker, 3 Barb. Ch., 46; Nicholson vs. Leavitt, 4 Sandf., 252; Jackson vs. Cornell, 1 Sandf. Ch., 348; Van Rossum vs. Walker, 11 Barb., 237; Wilson vs. Robertson, 21 N. Y., 587; 19 How. Pr., 350; Smith vs. Howard, 20 How Pr., 121; Cox vs. Platt, 32 Barb., 126; 19 How. Pr., 121; Turner vs. Jaycox, 40 Barb., 164; Scott vs. Guthrie, 26 How. Pr., 481, 512.

N. Y. C. C., Sec. 1931.

SEC. 3457. An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases :

Assignment,  
when void

1. If it gives an unlawful preference of one debt or class of debts over another.

2. If it gives a preference dependent upon any condition or contingency, or with any power of revocation reserved.

3. If it tends to coerce any creditor to release or compromise his demand.

4. If it provides for the payment of any claim known to the assignor to be false or fraudulent; or for the payment of more upon any claim than is justly due from the assignor.

5. If it reserves any interest in the assigned property, or in any part thereof, to the assignor or for his benefit, before all his existing debts are paid.

6. If it confers upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust.

7. If it exempts him from liability for neglect of duty or misconduct; or,

8. If it violates Sec. 3456 of this Code.

N. Y. C. C., Sec. 1932.

SEC. 3458. An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing. It must be acknowledged, or proved and certified, in the mode prescribed by the chapter on *Recording Transfers of Real Property*, and recorded as required by Secs. 3463 and 3464; but recording in one county constitutes a compliance with the following section.

The instru-  
ment of  
assignment.

N. Y. C. C., Sec. 1933.

NOTE.—The words “and if it embraces a fee or freehold estate in real property it must be sealed” are stricken out, as seals are abolished. The section is also modified so that assignment will not take effect until recorded.

SEC. 3459. Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto.

Compliance  
with pro-  
visions of  
last section  
necessary to  
validity of  
assignment.

N. Y. C. C., Sec. 1934.

Assignee  
takes, sub-  
ject to rights  
of third  
parties.

SEC. 3460. An assignee for the benefit of creditors is not to be regarded as a purchaser for value, and has no greater rights than his assignor had, in respect to things in action transferred by the assignment.

*Curtis vs. Leavitt*, 15 N. Y., 195; *Van Housen vs. Radcliff*, 17 id., 580; *Griffin vs. Marquardt*, id., 28; *Leger vs. Bonaffe*, 2 Barb., 475; *Warren vs. Fenn*, 28 id., 333; *Marine and Fire Ins. Bank vs. Jauncey*, 1 id., 456; *Matter of Howe*, 1 Paige, 125; *Mead vs. Phillips*, 1 Sandf. Ch., 83; *Bliss vs. Cottle*, 32 Barb., 322; *Reed vs. Sands*, 37 id., 165; *Maas vs. Goodman*, 2 Hilt., 275; *Schieffelin vs. Hawkins*, 14 Abb. Pr., 112.

N. Y. C. C., Sec. 1935.

Inventory,  
required.

SEC. 3461. Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file, in the manner prescribed by Sec. 3463, a full and true inventory, showing—

1. All the creditors of the assignor.
2. The place of residence of each creditor, if known to the assignor, or if not known, that fact must be stated.
3. The sum owing to each creditor and the nature of each debt or liability, whether arising on written security, account or otherwise.
4. The true consideration of the liability in each case, and the place where it arose.
5. Every existing judgment, mortgage or other security for the payment of any debt or liability of the assignor.
6. All property of the assignor at the date of the assignment, which is exempt by law from execution; and,
7. All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the encumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property according to the best knowledge of the assignor.

N. Y. C. C., Sec. 1936.

Verification  
of inventory.

SEC. 3462. An affidavit must be made by every person executing an assignment for the benefit of creditors, to be annexed to and filed with the inventory mentioned in the last section, to the effect that the same is in all respects just and true, according to the best of such assignor's knowledge and belief.

N. Y. C. C., Sec. 1937.



SEC. 3463. An assignment for the benefit of creditors must be recorded, and the inventory required by Sec. 3461 filed with the County Recorder of the county in which the assignor resided at the date of the assignment; or, if he did not then reside in this State, with the Recorder of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this State, with the Recorder of the county in which the principal part of the assigned property was then situated.

Recording  
assignment  
and filing  
inventory.

N. Y. C. C., Sec. 1938.

SEC. 3464. If an assignment for the benefit of creditors is executed by more than one assignor, it may be recorded, and a copy of the inventory required by Sec. 3461 may be filed with the Recorder of the county in which any of the assignors resided at its date, or in which any of them, not then residing in this State, had then a place of business.

Same.

N. Y. C. C., Sec. 1939.

SEC. 3465. An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value, unless it is recorded, and unless the inventory required by Sec. 3461 is not filed, pursuant to Sec. 3463, within twenty days after the date of the assignment.

Effect of  
omitting to  
record.

N. Y. C. C., Sec. 1940—modified.

SEC. 3466. Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of Art. IV of the chapter on *Recording Transfers*, as well as to those of this Title.

Assignment  
of real  
property.

N. Y. C. C., Sec. 1941.

SEC. 3467. Within thirty days after the date of an assignment for the benefit of creditors, the assignee must enter into a bond to the people of this State, in such amount as may be fixed by the County Judge of the county in which the original inventory is filed, with sufficient sureties, to be approved by such Judge, and conditioned for the faithful discharge of the trust, and the due accounting for all moneys received by the assignee, which bond must be filed in the same office with the original inventory.

Bond of  
assignees.

N. Y. C. C., Sec. 1942.

Conditions of  
disposal and  
conversion.

SEC. 3468. Until the inventory and affidavit required by Secs. 3461 and 3462 have been made and filed, and the assignee has given a bond as required by the last section, the assignee for the benefit of creditors has no authority to dispose of the estate or convert it to the purposes of the trust.

N. Y. C. C., Sec. 1943.

Accountings

SEC. 3469. After six months from the date of an assignment for the benefit of creditors, the assignee may be required, on the petition of any creditor, to account before the County Judge of the county where the accompanying inventory was filed, in the manner prescribed by the CODE OF CIVIL PROCEDURE.

The mode of proceeding is left to be regulated by the Code of Civil Procedure.

N. Y. C. C., Sec. 1944.

Property  
exempt.

SEC. 3470. Property exempt from execution, and insurances upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby.

N. Y. C. C., Sec. 1945.

Compensa-  
tion.

SEC. 3471. In the absence of any provision in the assignment to the contrary, an assignee for the benefit of creditors is entitled to the same commissions as are allowed by law to executors and guardians; but the assignment cannot grant more, and may restrict the commissions to a less amount, or deny them altogether.

N. Y. C. C., Sec. 1946.

Assignees  
protected for  
acts done in  
good faith.

SEC. 3472. An assignee for the benefit of creditors is not to be held liable for his acts, done in good faith, in the execution of the trust, merely for the reason that the assignment is afterward adjudged void.

N. Y. C. C., Sec. 1947.

Assent of  
creditor nec-  
essary to  
modification  
of assign-  
ment.

SEC. 3473. An assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be cancelled or modified by the parties thereto, without the consent of every creditor affected thereby.

N. Y. C. C., Sec. 1948.

# PART III.

## NUISANCE.

### TITLE I. GENERAL PRINCIPLES.

#### II. PUBLIC NUISANCES.

#### III. PRIVATE NUISANCES.

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## TITLE I.

### GENERAL PRINCIPLES.

#### SECTION 3479. Nuisance, what.

3480. Public nuisance.

3481. Private nuisance.

3482. What is not deemed a nuisance.

3483. Successive owners.

3484. Abatement does not preclude action.

SEC. 3479. A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either—

Nuisance,  
what.

1. Annoys, injures or endangers the comfort, repose, health or safety of others; or,

2. Offends decency; or,

3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or,

4. In any way renders other persons insecure in life, or in the use of property.

This definition corresponds with that given of public nuisance, in the Penal Code, Sec. 430, except that it is modified to embrace private nuisance also. Numerous authorities on the different branches of the definition are collected in a note to the section of the Penal Code referred to. See, also, *People vs. Vanderbilt*, 26 N. Y., 287; 25 How. Pr., 139; 38 Barb., 282; *Niagara Falls International Bridge Co. vs. Great Western R. R. Co.*, 39 Barb., 212.

N. Y. C. C., Sec. 1949.

Public  
nuisance.

SEC. 3480. A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

N. Y. C. C., Sec. 1950.

Private  
nuisance.

SEC. 3481. Every nuisance not included in the definition of the last section is private.

N. Y. C. C., Sec. 1951.

What is not  
deemed a  
nuisance.

SEC. 3482. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

N. Y. C. C., Sec. 1952.

Successive  
owners.

SEC. 3483. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

N. Y. C. C., Sec. 1953.

Abatement  
does not  
preclude  
action.

SEC. 3484. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

N. Y. C. C., Sec. 1954.

## TITLE II.

### PUBLIC NUISANCES.

SECTION 3490. Lapse of time does not legalize.

3491. Abatement.

3492. When notice is required.

3493. Remedies for public nuisance.

3494. Action.

3495. How abated.

Lapse of  
time does  
not legalize.

SEC. 3490. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

N. Y. C. C., Sec. 1955.

Abatement.

SEC. 3491. The remedies against a public nuisance are :

1. Indictment.
2. A civil action ; or,
3. Abatement.

N. Y. C. C., Sec. 1956.

**SEC. 3492.** The remedy by indictment is regulated by **the PENAL CODE.** When notice is required.

N. Y. C. C., Sec. 1957.

**SEC. 3493.** A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise. Remedies for public nuisance.

N. Y. C. C., Sec. 1958.

**SEC. 3494.** A public nuisance may be abated by any public body or officer authorized thereto by law. Action.

The powers of various bodies and officers to act in the abatement of nuisances, are, however, to be sought in the statutes conferring them; they are not properly within the scope of the Civil Code.

N. Y. C. C., Sec. 1959.

**SEC. 3495.** Any person may abate a public nuisance which is specially injurious to him, by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. How abated.

N. Y. C. C., Sec. 1960.

## TITLE III.

### PRIVATE NUISANCES.

**SECTION 3501.** Remedies for private nuisance.

3502. Abatement, when allowed.

3503. When notice is required.

**SEC. 3501.** The remedies against a private nuisance are— Remedies for private nuisance.

1. A civil action ; or,
2. Abatement.

N. Y. C. C., Sec. 1961.

Abatement,  
when  
allowed.

SEC. 3502. A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury.

N. Y. C. C., Sec. 1962.

When notice  
is required.

SEC. 3503. Where a private nuisance results from a mere omission of the wrong-doer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it.

N. Y. C. C., Sec. 1963.

## PART IV.

### MAXIMS OF JURISPRUDENCE.

SEC. 3509. The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application.

The maxims given in the text are not meant to be mere translations of the Latin originals mentioned in the notes ; but such an explanation of them as is supposed to be most just and consonant with our legal system.

It will be observed that those maxims only are presented which have a general application. Such maxims as "*caveat emptor*," "*qui facit per alium*," etc., which apply to sales and agency, more particularly, and others of a like character, are omitted. In respect to such it is thought better to state the proper rules completely in the chapter of the Code relating to the particular topic, than to refer to this Part for any additional principles.

N. Y. C. C., Sec. 1964.

SEC. 3510. When the reason of a rule ceases, so should the rule itself.

"*Cessante ratione legis cessat ipsa lex.*" (Co. Litt., 70 b. ; Branch's Maxims, 68 ; Richards vs. Heather, 1 B. & Ald., 33.)

N. Y. C. C., Sec. 1965.

SEC. 3511. Where the reason is the same, the rule should be the same.

"*Ubi eadem ratio ibi idem jus.*" (Co. Litt., 10 a. ; Branch's Max., 64.)

N. Y. C. C., Sec. 1966.

SEC. 3512. One must not change his purpose to the injury of another.

"*Nemo potest mutare consilium suum in alterius injuriam.*" (Dig., 50, 17, 75). The spirit and application of this maxim are examined by Chancellor Kent, in Dash vs. Van Kleeck, 7 Johns., 54, with special reference to retroactive statutes. In Bonati vs. Welsch (24 N. Y., 157, 162), it was held, partly upon the authority of this maxim, that a husband's change of domicile did not affect the rights of property which his wife acquired at her marriage by the law of the place where they were married.

N. Y. C. C., Sec. 1967.

SEC. 3513. Any one may waive the advantage of a law intended solely for his benefit. But a law established for

a public reason cannot be contravened by a private agreement.

*"Quilibet potest renunciare juri pro se introducto."* (Branch's Max., 309.) Compare *"Modus et conventio vincunt legem."*

N. Y. C. C., Sec. 1968.

SEC. 3514. One must so use his own rights as not to infringe upon the rights of another.

*"Sic utere tuo ut alienum non ledas."* (9 Co. Rep., 59; Branch's Max., 160.)

N. Y. C. C., Sec. 1969.

SEC. 3515. He who consents to an act is not wronged by it.

*"Volenti non fit injuria."* (Bracton, fol. 18; Branch's Max., 127; Hartfield vs. Roper, 21 Wend., 620; Corwin vs. N. Y. & Erie R. R. Co., 13 N. Y., 49; Lyon vs. Tallmadge, 1 Johns. Ch., 187; Palmer vs. Lord, 6 Johns. Ch., 101; Lemmon vs. People, 20 N. Y., 628.) *"Nulla injuria est quæ in volentem fiat."* (Dig., 47, 10, 1, 5.)

N. Y. C. C., Sec. 1970.

SEC. 3516. Acquiescence in error takes away the right of objecting to it.

*"Consensus tollit errorum,"* is a maxim of the common law and the dictate of common sense." (Rogers vs. Cruger, 7 Johns., 611.)

N. Y. C. C., Sec. 1971.

SEC. 3517. No one can take advantage of his own wrong.

*"Nullus commodum capere potest de injuria sua propria."*

N. Y. C. C., Sec. 1972.

SEC. 3518. He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession.

*"Qui dolo desierit possidere, pro possidente damnatur."*

N. Y. C. C., Sec. 1973.

SEC. 3519. He who can and does not forbid that which is done on his behalf, is deemed to have bidden it.

*"Semper qui non prohibet pro se intervenire mandari creditur."*

N. Y. C. C., Sec. 1974.

SEC. 3520. No one should suffer by the act of another.

*"Res inter alios acta alteri nocere non debet."* (See Gelston vs. Hoyt, 13 Johns., 361, 381; Sweet vs. Barney, 23 N. Y., 335, 341; Langdon vs. Astor, 16 N. Y., 9, 31.)

N. Y. C. C., Sec. 1975.



SEC. 3521. He who takes the benefit must bear the burden.

*"Qui sentit commodum, sentire debet et onus."* (Paine vs. Bonney, 6 Abb. Pr., 106; Frost vs. Saratoga Ins. Co., 5 Denio, 158; Bartlett vs. Crozier, 17 Johns., 453; Hendricks vs. Judah, 2 Cai., 25, 28; United Ins. Co. vs. Robinson, id., 280, 283; Matter of Mayor, etc., of New York, 11 Johns., 771.) One who takes an estate in land and enjoys the benefits resulting from his title, must bear the burdens of the encumbrances upon the land and of the covenants that run with it (Denman vs. Prince, 40 Barb., 213; Verplanck vs. Wright, 23 Wend., 506; Priestly vs. Foulds, 2 Scott N. R., 225).

N. Y. C. C., Sec. 1976.

SEC. 3522. One who grants a thing is presumed to grant also whatever is essential to its use.

*"Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest."* (See Sterricker vs. Dickinson, 9 Barb., 518; Troup vs. Hurlbut, 10 id., 359.)

N. Y. C. C., Sec. 1977.

SEC. 3523. For every wrong there is a remedy.

*"Ubi jus, ibi remedium."* (Johnstone vs. Sutton, 1 T. R., 312.)

N. Y. C. C., Sec. 1978.

SEC. 3524. Between those who are equally in the right, or equally in the wrong, the law does not interpose.

*"In equali jure melior est conditio possidentis."* (Ontario Bank vs. Worthington, 12 Wend., 601; M'Laughlin vs. Waite, 9 Cow., 674; Graves vs. Delaplaine, 14 Johns., 159.)  
*"In pari delicto potior est conditio defendentis."* (See Peck vs. Burr, 10 N. Y., 294.)

N. Y. C. C., Sec. 1979.

SEC. 3525. Between rights otherwise equal, the earliest is preferred.

*"Que prior est in tempore potior est in jure."* (See Muir vs. Schenck, 3 Hill, 228; Poillon vs. Martin, 1 Sandf. Ch., 578; Watson vs. Le Row, 6 Barb., 485.)

N. Y. C. C., Sec. 1980.

SEC. 3526. No man is responsible for that which no man can control.

*"Actus Dei facit nemini injuriam."* This is a maxim of the common law with regard to obligations created merely by operation of law; but it has not been considered applicable to contracts. (Tompkins vs. Dudley, 25 N. Y., 170; Harmony vs. Bingham, 12 N. Y., 99; Brown vs. Royal Ins. Co., 1 El. & El., 853.) The Commissioners have proposed, however, to extend this principle to contracts. (See Sec. 727.)

N. Y. C. C., Sec. 1981.

SEC. 3527. The law helps the vigilant, before those who sleep on their rights.

*"Vigilantibus non dormientibus leges subveniunt."* (Toole vs. Cook, 16 How. Pr., 144.)

N. Y. C. C., Sec. 1982.

SEC. 3528. The law respects form less than substance.

Francis' Maxims, No. 13.

N. Y. C. C., Sec. 1983.

SEC. 3529. That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due.

Thus an agreement for a valuable consideration will be treated as actually executed from the period when it ought to have been performed in favor of a person entitled to insist on its performance. On this principle, money agreed or devised to be laid out in land will be treated as real estate; and land contracted or devised to be sold will be treated as money. (Story Eq. Jur., Sec. 64, g.; Adams' Equity, 74.) See, for other illustrations of the maxim, Burch vs. Newberry, 1 Barb., 648, 664; Hasbrouck vs. Paddock, 1 id., 635; Craig vs. Leslie, 3 Wheat., 563; Roosevelt vs. Bank of Niagara, Hopk., 583.

N. Y. C. C., Sec. 1984.

SEC. 3530. That which does not appear to exist is to be regarded as if it did not exist.

*"De non apparentibus et de non existentibus eadem est ratio."* (Johnson vs. Stagg, 2 Johns., 519.)

N. Y. C. C., Sec. 1985.

SEC. 3531. The law never requires impossibilities.

*"Lex non cogit ad impossibilia."* (Co. Litt., 231, b.; Schroeder vs. Hudson River R. R. Co., 5 Duer, 62.) *"Impotentia excusat legem."* (Jackson vs. Sellick, 3 Johns., 271; Jackson vs. Johnson, 5 Cow., 103.)

N. Y. C. C., Sec. 1986.

SEC. 3532. The law neither does nor requires idle acts.

*"Lex non cogit ad vana seu inutilia."* (Boot vs. Franklin, 3 Johns., 210.) *"Lex nil frustra facit."* It is a settled principle, says Chancellor Kent, that a Court will not undertake to exercise a power unless it can exercise it to some purpose. (Huntington vs. Nicoll, 3 Johns., 598.)

N. Y. C. C., Sec. 1987.

SEC. 3533. The law disregards trifles.

*"De minimis non curat lex. Nimia subtilitas in jure reprobatur. Bonæ fidei non convenit de apicibus juris disputare."* (Ulpian, Dig., 17, 1, 29; see Shipman vs. Shafer, 14 Abb. Pr., 456; Matter of Empire City Bank, 18 N. Y., 218.)

N. Y. C. C., Sec. 1988.

**Sec. 3534.** Particular expressions qualify those which are general.

*"In toto jure generi per speciem derogatur et illud potissimum habetur quod ad speciem directum est."* (See *Platt vs. Lott*, 17 N. Y., 478.)

N. Y. C. C., Sec. 1989.

**Sec. 3535.** Contemporaneous exposition is in general the best.

*"Contemporanea expositio est optima et fortissima in lege."* In construing a statute, great regard should be paid to the opinion in respect to it entertained by persons learned in the law at the time of its passage. (*Sedgwick Stat. and Const. Law*, 251; *Dwarris*, 562.)

N. Y. C. C., Sec. 1990.

**Sec. 3536.** The greater contains the less.

*"Omne majus continet in se minus. In eo quod plus est semper inest et minus."* (Dig., 50, 17, 110.) *"Non debet cui plus licet. Quod minus est non licere."* (Ulpian Gothofredi, Reg. Juris. Compare Dig., 50, 17, 26-37.) *"Omne majus in se minus complectitur."* (*Kip vs. Brigham*, 6 Johns., 157.)

N. Y. C. C., Sec. 1991.

**Sec. 3537.** Superfluity does not vitiate.

*"Utile per inutile non vitiatur."* (*Rickets vs. Livingston*, 2 Johns. Cas., 101; *Yates' Case*, 4 Johns., 367; *Ogden vs. Barker*, 18 id., 93; *Aylesworth vs. Brown*, 10 Barb., 174.) This maxim has long been familiar to the common law. It has had frequent application in the law of conveyancing, of pleading and of evidence.

N. Y. C. C., Sec. 1992.

**Sec. 3538.** That is certain which can be made certain.

*"Id certum est quod certum reddi potest."* (*Olmsted vs. Loomis*, 9 N. Y., 434; *Hyland vs. Stafford*, 10 Barb., 565; *Ostrander vs. Walter*, 2 Hill, 332.)

N. Y. C. C., Sec. 1993.

**Sec. 3539.** Time does confirm a void act.

*"Quod ab initio non valet in tractu temporis non convalescit. Quod initio vitiosum est non potest tractu temporis convalescere."*

"The general rule is that whenever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, *quod ab initio*," etc. (*Story Eq. Jur.*, Sec. 306; *Vernon's case*, 4 Co. Rep., 2 b.) "No length of time," said Lord Talbot, "will bar a fraud." (*Cas. temp. Talbot*, 73.)

N. Y. C. C., Sec. 1994.

**Sec. 3540.** The incident follows the principal, not the principal the incident.

*Battle vs. Coit*, 26 N. Y., 404. *"Accessorium non ducit sed sequitur suum principale."*

N. Y. C. C., Sec. 1995.

Sec. 3541. An interpretation which gives effect is preferred to one which makes void.

*"Ut res magis valeat quam pereat."* (Langdon vs. Astor, 16 N. Y., 47; Nichols vs. McEwen, 17 id., 25; Laub vs. Buckmiller, id., 627.)

N. Y. C. C., Sec. 1906.

Sec. 3542. Interpretation must be reasonable.

Everything is to have a reasonable construction, and everything necessary to make a rule reasonable is implied. (Jones vs. Gibbons, 8 Exch., 922; see Buck vs. Burk, 18 N. Y., 339, 341.)

N. Y. C. C., Sec. 1997.

Sec. 3543. Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.

In Griswold vs. Haven (25 N. Y., 595), this maxim is asserted and enforced as a principal upon which, independently of the law of agency, an innocent party may be held responsible for the acts of another. The maxim is also cited and applied in Exchange Bank vs. Monteath, 26 N. Y., 505, 513; Sanford vs. Handy, 23 Wend., 268; Root vs. French, 13 id., 572.

N. Y. C. C., Sec. 1998.

# PART V.

## DEFINITIONS AND GENERAL PROVISIONS.

**SECTION 3549.** Code and Common Law one system.

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•change others.

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3591. Repeal of former statutes.

Code and  
Common  
Law one  
system.

SEC. 3549. This Code and the Common Law are but parts of one system, differing only in their mode of adoption.

[New section.]

Code decla-  
ration of one  
Common  
Law prin-  
ciple does  
not change  
others.

SEC. 3550. The declaration or expression of a Common Law rule or principle in this Code does not enlarge, limit or change its effect, except so far as such rule or principle is changed by the terms of the Code. It still bears the same relation to the body of the Common Law as it did before the adoption of the Code.

[New section.]

Expression  
of one subor-  
dinate rule  
does not  
abrogate  
others.

SEC. 3551. The expression in this Code of a general Common Law rule upon a subject does not, by implication, change or abrogate subordinate rules pertaining to the same subject; nor does the expression of a portion of the subordinate rules abrogate or change, by implication, other subordinate rules not expressed in Code form.

[New section.]

The rule that  
statutes in  
derogation  
of Common  
Law, not  
applicable.

SEC. 3552. The rule that statutes in derogation of the Common Law are to be strictly construed has no application to this Code.

N. Y. C. C., Sec. 2032.

Statutes and  
Common  
Law sub-  
stantially  
the same—a  
continuation  
of.

SEC. 3553. The provisions of this Code, so far as they are substantially the same as existing statutes, or Common Law, must be construed as continuations thereof, and not as new enactments.

Rev. Laws of Mass., 1858, Chap. 182, Sec. 9.

NOTE.—The words "or Common Law" are new, and inserted to correspond with the theory of the four preceding sections.

How Code is  
construed.

SEC. 3554. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

NOTE.—It is very difficult to properly clothe the ideas sought to be expressed in the five preceding sections. These sections need to be considered in connection with Sec. 7 of

this Code. They want a *new* judgment from a *new* standpoint—the judgment of an Examining Board; perhaps should be transferred to follow Sec. 7, or to supersede it. Sec. 3553 is of doubtful propriety, though drawn from high authority.

SEC. 3555. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning; except when a contrary intention plainly appears, and except, also, that the words hereinafter explained are to be understood as thus explained.

Words, how used.

N. Y. C. C., Sec. 1999—enlarged from Mass.

SEC. 3556. Whenever the meaning of a word or phrase is defined in any part of this Code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

Sundry words.

N. Y. C. C., Sec. 2000.

SEC. 3557. There are three degrees of care and diligence mentioned in this Code, namely, slight, ordinary and great. The latter include the former.

Degrees of care and diligence.

N. Y. C. C., Sec. 2001.

SEC. 3558. Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care or diligence is such as they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as they usually exercise about their own affairs of great importance.

Care and diligence.

N. Y. C. C., Sec. 2002.

SEC. 3559. There are three degrees of negligence mentioned in this Code, namely, slight, ordinary and gross. The latter include the former.

Degrees of negligence.

N. Y. C. C., Sec. 2003.

SEC. 3560. Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence.

Negligence.

N. Y. C. C., Sec. 2004.

**Children.** SEC. 3561. The term "children," as used in this Code, includes children by birth and by adoption.

N. Y. C. C., Sec. 2005.

**Debtor and creditor.** SEC. 3562. Except in Part III of this Division, every one who owes to another the performance of an obligation is called a debtor, and the one to whom he owes it is called a creditor.

N. Y. C. C., Sec. 2006.

**Good faith.** SEC. 3563. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

N. Y. C. C., Sec. 2007.

**Notice.** SEC. 3564. Notice is either actual or constructive.

N. Y. C. C., Sec. 2008.

**Actual notice.** SEC. 3565. Actual notice consists in express information of a fact.

N. Y. C. C., Sec. 2009.

**Constructive notice.** SEC. 3566. Constructive notice is notice imputed by the law to a person not having actual notice.

N. Y. C. C., Sec. 2010.

**Certain persons deemed to have constructive notice.** SEC. 3567. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

If the party who receives information of circumstances suggesting an inquiry for the principal fact, makes that inquiry with due diligence, the result must be either that he will ascertain the fact, or that he will be prevented from doing so by causes for which he is not to blame, and from which he ought not to suffer. If he ascertains it, he then has actual notice, and the doctrine of constructive notice does not apply. If, notwithstanding due diligence, he fails to ascertain it, notice ought not to be imputed to him. The Commissioners, therefore, as respects circumstances putting a person upon inquiry, have limited the doctrine of constructive notice to cases in which there is a failure to make diligent inquiry (see *Foster vs. Beals*, 21 N. Y., 247; *Williamson vs. Brown*, 15 N. Y., 354; *Fassett vs. Smith*, 23 N. Y., 252). The decision in *Kellogg vs. Smith*, 26 N. Y., 13, is put upon the ground that there was a duty of inquiry, both for the bond and the mortgage; but the inquiry made was only as to the mortgage.

N. Y. C. C., Sec. 2011.



**SEC. 3568.** A notice which is false when given, is not made valid by the subsequent happening of the event. Notice, when impossible.

Griffin vs. Goff, 12 Johns., 422; Jackson vs. Richards, 2 Cal., 343. Notice that a party will perform a specified act, is, in strictness, notice of an existing intention to perform the act only.

N. Y. C. C., Sec. 2012.

**SEC. 3569.** The word "paper," as used in this Code, means any flexible material upon which it is usual to write. Paper.

N. Y. C. C., Sec. 2013.

**SEC. 3570.** The word "person," as used in this Code, except when used by way of contrast, includes not only human beings, but bodies politic or corporate. Person.

N. Y. C. C., Sec. 2014.

**SEC. 3571.** The word "several," as used in this Code in relation to number, means two or more. Several.

N. Y. C. C., Sec. 2015.

**SEC. 3572.** The words "third persons," as used in this Code, include all who are not parties to the obligation or transaction concerning which the phrase is used. Third persons.

N. Y. C. C., Sec. 2016.

**SEC. 3573.** Holidays, within the meaning of this Code, are, every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving or holiday. Holidays.

N. Y. C. C., Sec. 2017; Stats. 1851, 523; 1861, 310.

**SEC. 3574.** If the first of January, the twenty-second of February, the fourth of July, or the twenty-fifth of December, falls upon a Sunday, the Monday following is a holiday. Same.

N. Y. C. C., Sec. 2018.

**SEC. 3575.** All other days than those mentioned in the last two sections are to be deemed business days, for all purposes. Business days.

N. Y. C. C., Sec. 2019.

Certain acts  
not to be  
done on  
holidays.

SEC. 3576. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

N. Y. C. C., Sec. 2020.

Usage, what.

SEC. 3577. Usage, within the meaning of this Code, is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general and uniform, that they must be presumed to have acted with reference thereto.

Bowen vs. Stoddard, 10 Metc., 30. See Cuthbert vs. Cumming, 10 Exch., 815; aff'd, 11 id., 405.

Merchants' Bank vs. Woodruff, 6 Hill, 174; Bowen vs. Newell, 8 N. Y., 190.

Cuthbert vs. Cumming, 11 Exch., 408; Code La., 1961.

Stewart vs. Aberdeen, 4 M. & W., 211; see Sweeting vs. Pearce, 7 C. B. [N. S.], 481; Horton vs. Morgan, 19 N. Y., 170.

Cuthbert vs. Cumming, 11 Exch., 405, aff'g S. C., 10 id., 809; Graves vs. Legg, 2 H. & N., 210, aff'g S. C., 11 Exch., 642; 9 id., 709.

Smith vs. Wright, 1 Cal., 43; U. S. vs. Buchanan, 8 How. [U. S.], 102.

Sweeting vs. Pearce, *supra*; Gabay vs. Lloyd, 3 B. & C., 793; Scott vs. Irving, 1 B. & Ad., 605; Todd vs. Reid, 4 B. & Ald., 210; Lewis vs. Marshall, 7 M. & G., 745; Cope vs. Dodd, 13 Penn. St., 37.

U. S. vs. Buchanan, 8 How. [U. S.], 102; Cope vs. Dodd, 13 Penn. St., 33, 37; Wood vs. Wood, 1 Carr. & P., 59; Lewis vs. Marshall, *supra*.

Hinton vs. Locke, 5 Hill, 439; U. S. vs. Buchanan, 8 How. [U. S.], 102. See Wadsworth vs. Alcott, 6 N. Y., 72.

N. Y. C. C., Sec. 2021.

Same.

SEC. 3578. The words "usual," and "customary," as used in this Code, mean "according to usage."

N. Y. C. C., Sec. 2022.

Value.

SEC. 3579. A valuable consideration, within the meaning of this Code, is a thing of value parted with, or a new obligation assumed, at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply "value."

N. Y. C. C., Sec. 2023.

Verdict.

SEC. 3580. The word "verdict," as used in this Code, includes not only the verdict of a jury, but also the find-

ing upon the facts, of a Judge, or of a Referee appointed to determine the issues in a cause.

N. Y. C. C., Sec. 2024.

SEC. 3581. The word "year," as used in this Code, means a calendar year, and "month," a calendar month. Fractions of a year are to be computed by the number of months, thus, half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day, and involve no questions of priority.

Time.

N. Y. C. C., Sec. 2025.

SEC. 3582. Words used in this Code in the masculine gender include the feminine, except where a contrary intention plainly appears.

Genders.

N. Y. C. C., Sec. 2026.

SEC. 3583. Words used in this Code in the singular number include the plural, and the plural the singular, except where a contrary intention plainly appears.

Numbers.

N. Y. C. C., Sec. 2027.

SEC. 3584. Words used in the present tense include the future, but exclude the past.

Tense.

N. Y. C. C., Sec. 2028.

SEC. 3585. The words "compound interest," as used in this Code, mean interest added to the principal as the former becomes due, and thereafter made to bear interest.

"Compound interest,"  
what.

N. Y. C. C., Sec. 2029.

SEC. 3586. The term "signature" includes any name, mark or sign, written with intent to authenticate any instrument or writing.

"Signature"  
what.

SEC. 3587. The words "writing" and "written," as used in this Code, include "printing" and "printed," except in the case of signatures, and where the words are used by way of contrast to printing. Writing may be made in any manner, except that when a person entitled to require the execution of a writing demands that it be made with ink, it must be so made.

"Writing,"  
what.

N. Y. C. C., Sec. 2030.

SEC. 3588. The word "oath" includes "affirmation" in all cases where an affirmation may be substituted for

"Oath,"  
what.

an oath; and in like cases the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one, in the term "depose."

"Seal,"  
what.

SEC. 3589. When the seal of a Court or public officer, or officer, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

"State,"  
what.

SEC. 3590. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories.

Repeal of  
former  
statutes.

SEC. 3591. All statutes, laws and rules heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided.

N. Y. C. C., Sec. 2033.

NOTE.—*Definitions and General Provisions* can be better arranged after the four Codes are sectionized, printed and indexed. Provisions that are general—applicable to the four Codes—should be classified and printed in each Code with the more special provisions pertaining to that particular Code. It is possible some of the definitions are duplicated in substance by appearing in the same or different form in the body of the work. Attention is called to the consideration of the subject after the indexes are prepared, or after the Codes are printed, when the matter can be examined with greater facility.

## FINAL NOTE.

This Code is not put forth as complete. Some defects must exist in the arrangement and first print of a work of this character and extent. It is unnecessary to particularize the difficulties, patent and latent, which accompany such a codification, and from which arise some omissions, repetitions, conflicts, and sometimes faulty expression. The fact that the revisers have felt themselves under "lash and spur," to reach certain results before a meeting of the Legislature, has constituted a little of the embarrassment in revision. The Commissioners have, for the most part, worked separately. The Titles on *Corporations, Wills, Succession, Homesteads, Partnership and Insurance*, have been prepared by one Commissioner, and the remainder of the Code by another, while the third was engaged on the other Codes. No part of the work has passed the critical ordeal of the mind of more than one Commissioner. Many sections have been presented for *consideration*, rather than adoption. In a few instances attention is called by notes to different sections and points to be considered. The work is now in condition—arranged, sectionized and printed—to afford the greatest facility for a careful examination.

It is to be regretted that the Commission has not had the time to give it such examination, and more fully compare its provisions with our Supreme Court decisions. It will be observed that they were examined and noted with considerable pains-taking in the earlier part of the work, but it became evident that less time must be spent in this particular labor, or failure to make the volume ready for the Legislature must ensue. It is believed, however, that there are but very few instances in which the law, as stated in the Code, is not in consonance with the decisions, so far as they have been rendered upon the subjects treated; and in most of these few cases it will probably be found that the rule ought to be as contained in the Code.

A judicious selection and citation of leading cases under each section, from the notes and references under corresponding sections of the New York Civil Code, would give a useful finish to the work. These can be added after adoption, in the publication, if deemed advisable.

Let us now turn to the other side of the question. Reasonable completeness is all that can be expected before adoption, trusting somewhat to future amendment to remedy such defects as cannot be well foreseen. Much care and labor has been bestowed upon the Code. It is *very nearly completed*. With the facilities now offered for a final examination, it is believed that it can be made ready for adoption before the adjournment of the coming Legislature; probably at a comparatively early period in the session. It is due to the Bench and Bar, to speak candidly of all possible defects; but at the same time, with a clear conception of the condition, it is confidently believed that it will be perfected for adoption as above indicated. Of course the degree of perfection to which a work of this character can be brought depends upon the time, patience, industry and good judgment bestowed upon it. The labor shall be unremitting until absolute recommendation for adoption can be given. A further exposition will accompany its presentation to the Legislature, showing where each statute embraced may be found, and if disintegrated and distributed to different Titles, then the sections will be given, showing where the several parts are; especially will it be so with the important statute of "Fraudulent Conveyances and Contracts."

It rests principally with the Bench and Bar to scrutinize the style, accuracy and consistency of the Code, and to pass judgment upon it. If perfected and adopted, it will prove an immeasurable blessing to the present and future generations.

# **I N D E X .**





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NOTE.

There are two modes of indexing:

*First*—A scientific index for the profession alone—an index to *subjects* more general—covering, perhaps, a third of the space of the present.

*Second*—A more popular or elaborate index, with a greater particularity of subjects; ample sub-headings, with repetitions, making sub-headings principal headings, in their appropriate places in the alphabet.

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